Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN D. ORR, BETTY E. SANFORD, FRANKIE L. MOORE, JIMMIE MARTIN, and NATHANIEL HENLEY,

Petitioners,

v.

AMERICAN HERITAGE LIFE INSURANCE COMPANY, FIRST COLONIAL INSURANCE COMPANY OF FLORIDA, and FIDELITY NATIONAL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The McCarran-Ferguson Act provides that if a federal statute that does not specifically relate to insurance conflicts with a state law passed to regulate the business of insurance, the federal law cannot invalidate, impair or supercede the state law, 15 U.S.C. § 1012(b). The State of Mississippi has enacted a comprehensive scheme of state laws to regulate the insurance industry and has granted the state Insurance Commissioner vast plenary powers to administer those laws. As part of those powers, the State of Mississippi has vested the Insurance Commissioner with the power to allow or disallow mandatory, binding arbitration agreements in insurance policies. The Fifth Circuit nonetheless, held that the Mississippi Commissioner of Insurance does not have the power to prevent arbitration agreements in their insurance products.

The question presented is whether, pursuant to the McCarran-Ferguson Act, Mississippi insurance laws and the power of the Mississippi Insurance Commissioner to regulate the business of insurance in Mississippi have been invalidated, impaired or superceded by the application of the Federal Arbitration Act to the present case.

2. Whether petitioners are entitled to a jury trial under § 4 of the Federal Arbitration Act and whether petitioners state and federal constitutional right to a jury trial has been abrogated by the application of the FAA to the case at bar.

3. Whether the arbitration agreements herein are unenforceable due to the high arbitration costs associated with the arbitration agreements.

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OPINIONS BELOW

The District Court's opinion (per Glen H. Davidson, Chief Judge) dated June 28, 2001 granting respondent's petition to compel arbitration, staying the proceedings in the state Court and closing the case. (Appendix B, 28a-38a). The Court of Appeals consolidated the five lower cases and rendered an opinion dated June 14, 2002 affirming the District Court (per Little, D.J., joined by Wiener, C.J. and by Dennis, C.J., specially concurring).

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on June 14, 2002. The Court of Appeals entered an order denying Petition for Rehearing By Panel on July 9, 2002. (Appendix C, 39a-41a).

Subject matter jurisdiction for the United State District Court for the Northern District of Mississippi is found in the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq*.

Subject matter jurisdiction for the Court of Appeals for the Fifth Circuit was invoked through the FAA and 28 U.S.C. § 1291.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves 9 U.S.C. § 4 of the Federal Arbitration Act and 15 U.S.C. § 1012(b) of the McCarran-Ferguson Act, Title 83 of the Mississippi Code of 1972 as amended, § 83-53-15 of the Mississippi Code of 1972 as amended, § 83-1-29 of the Mississippi Code of 1972 as amended, Article VII of the United States Constitution, Article 3, Section 24, 25 and 31 of the Mississippi Constitution of 1890.

STATEMENT OF THE CASE

Over the past several years petitioners obtained small, unsecured consumer loans from Republic Finance, Inc., hereinafter Respondent Lender, that included the purchase of credit life and credit disability insurance from American Heritage Life Insurance Company and First Colonial Insurance Company of Florida, hereinafter Respondent Insurers. As part of the adhesion-type contracts signed by the Petitioners and Respondent Lender, an arbitration agreement was included in the loan closing documents. Further, the Insurers were not signatories to the arbitration agreements.

It is important to note that in a matter separate and apart from the litigation in the case at bar and over a year prior to petitioner's filing their civil action against respondent's herein, one respondent insurer, First Colonial, submitted forms to the Mississippi Department of Insurance for approval. By submission dated September 30, 1999 First Colonial sought to add mandatory, binding arbitration clauses to insurance endorsements and insurance certificates sold by First Colonial to Mississippi policyholders. The Mississippi

Commissioner of Insurance, pursuant to his power granted by § 83-53-15 of the Mississippi Code of 1972 as amended, informed First Colonial on October 8, 1999 that mandatory, binding arbitration agreements will not be allowed in insurance products in Mississippi. First Colonial replied to the Commissioner's request, and deleted binding, mandatory arbitration clauses from their insurance policies in Mississippi.

Petitioners on November 17, 2000 commenced a civil action against all respondents in the Clay County, Mississippi Circuit Court seeking monetary damages on several counts including fraudulent misrepresentation in connection with the loan transactions, as well as conspiracy to sell credit life, credit disability, property or collateral protection insurance that was unnecessary and at an exorbitant premium far in excess of market rates, breach of implied covenants of good faith and fair dealing, breach of fiduciary duties and allegations that the insurers conspired with agents of respondent lender to sell unnecessary insurance at inflated rates.

Respondents lender and insurers filed independent actions in the United States District Court, Northern District of Mississippi, seeking orders of the court to compel arbitration under the Federal Arbitration Act (the "FAA") 9 U.S.C. § 1, *et seq.*

The District Court Judge issued an order compelling the parties to arbitration, and stayed all state court proceedings and "closed" the case. The respondent insurers cases, even though they were non-signatories to the arbitration agreement, were included in the order compelling arbitration. The District Judge concluded that the McCarran-Ferguson

Insurance Regulation Act, 15 U.S.C. § 1011-1015 (1999) (the "McCarran-Ferguson Act") did not reverse-preempt the FAA because petitioners failed to identify a Mississippi state law or statute that the FAA had invalidated, impaired or superceded.

He further concluded that Respondents are not entitled to a jury trial under § 4 of the FAA and that their Seventh Amendment right to a trial by jury was not violated by the order compelling the respondents to arbitrate their claim.

Petitioners appealed the district court decision to the Fifth Circuit. Respondents cross-appealed and argued, in part, that the district court's order was not an immediately appealable, final decision within the contemplation of § 16(a)(3) of the FAA.

The panel of judges assigned to the case, reviewed the district court's grant of the motion to compel arbitration de novo, and ruled in favor of the respondent Lender and Insurers on all the aforementioned issues except the appeals court further held that the arbitration agreements are not unenforceable because of the alleged high costs of arbitration. The Fifth Circuit found that the District Court's order was an immediately appealable, final decision pursuant to the FAA.

Petitioner's timely petitioned for a rehearing alleging that the panel considered evidence outside the record in deciding that the McCarran-Ferguson Act is not reverse-preempted by the FAA in this case and that the Fifth Circuit's opinion contained a glaring contradiction concerning the power of the Mississippi Insurance Commissioner to permit or disallow mandatory arbitration agreements within insurance policies in the State of Mississippi. The panel denied the Petition for Rehearing by Panel on July 9, 2002.

REASONS FOR GRANTING THE PETITION

I.

THE FIFTH CIRCUIT'S JUDGMENT IMPAIRS THE MISSISSIPPI INSURANCE COMMISSIONER'S STATUTORY POWERS TO REGULATE THE BUSINESS OF INSURANCE IN MISSISSIPPI

The petition should be granted because the Fifth Circuit's judgment as a practical matter, effectively eviscerates the Mississippi Insurance Commissioner's statutory given power to regulate the business of insurance in Mississippi.

The District Court opinion correctly stated that "The McCarran-Ferguson Act is designed to clear the way for state laws regulating the business of insurance by displacing any federal law that conflicts with such state laws." It went on to note that McCarran-Ferguson applies to those cases involving state regulation of the insurance industry and permits a state law to reverse preempt a federal statute only if: (i) the federal statute does not specifically relate to the business of insurance; (ii) the state law was enacted for the purpose of regulating the business of insurance; and (iii) the federal statute operates to "invalidate, impair, or supercede" the state law. *Munich American Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998).

"No one disputes the fact that the FAA does not specifically relate to insurance." *Stephens v. American Int'l Insurance Co.*, 66 F.3d 41, 44 (2d Cir. 1995), therefore the first part of the *Munich American* test is met herein.

The District Court and the Fifth Circuit both held that petitioners have failed to point to a single Mississippi state law that the FAA has invalidated, impaired or superceded.

However, petitioners have put forward the entire Title 83 of the Mississippi Code of 1972 in which Mississippi has created a comprehensive scheme to regulate insurance and vested the Mississippi Commissioner of Insurance with vast powers to regulate the business of insurance in Mississippi. Petitioners have further pointed out § 83-53-15 of the Mississippi Code of 1972 entitled "Credit Life and Credit Disability Insurance" as a state law that would be critically impaired, if not invalidated completely by the application of the FAA to the case at bar. There is no question that these are laws enacted for the purpose of regulating the business of insurance, thus satisfying the second part of *Munich American* test.

The District Court and the Appellate Court both bought into the straw man argument offered up by respondents that petitioners can show no state law that was invalidated, impaired or superceded by the application of the FAA and that petitioners were attempting a judicial end run by putting forth the argument that the Mississippi Insurance Commissioner's anti-arbitration stance was merely an informal policy of state officials and as such it cannot reverse-preempt the FAA. To rule so, the District and Appellate Court wrongfully concluded that the Mississippi Insurance Commissioner's statutory power found in § 83-53-15 was only an informal policy of a state official rather than a powerful enforcement tool granted to the Mississippi Insurance Commissioner by the Mississippi Legislature to regulate and control the business of insurance in Mississippi.

Specifically § 83-53-15 provides that no policy, endorsement, certificate of insurance or other insurance form may be issued by insurance companies doing business in Mississippi without the prior written permission of the Mississippi Insurance Commissioner. If his prior written approval is not granted and the insurance company proceeds to issue the insurance policy, endorsement or certificate of insurance, § 83-53-15 has deemed it unlawful for insurance companies to engage in such action. Further § 83-1-29 of the Mississippi Code of 1972 empowers the Commissioner to revoke or suspend all certificates of authority of insurance companies to do business in Mississippi or their agents, if the insurance company fails to comply with the law.

One of the respondents herein, First Colonial Insurance, seeking to test the Mississippi Insurance Commissioner's power provided by Mississippi statutes, submitted to the Commissioner for his review and approval, insurance endorsements and certificates containing mandatory, binding arbitration agreements. The submission, dated September 30, 1999 and submitted pursuant to § 83-53-15 of the Mississippi Code of 1972 was disallowed by the Mississippi Insurance Commissioner by letter to First Colonial, dated October 8, 1999 in which the insurer was told that mandatory binding arbitration agreements are not allowed in Mississippi insurance policies. In the instant case, if First Colonial had not removed the mandatory binding arbitration agreement from its insurance policy, the Commissioner could have revoked their right to do business in Mississippi.

It is ironic that the District Court and Appellate Court herein have allowed First Colonial to do something the Mississippi Insurance Commissioner would not allow First Colonial to do. First Colonial has been allowed to use a

mandatory, binding arbitration agreement to compel a party to arbitration, something that was heretofore unlawful for them to do pursuant to Mississippi law.

Section 83-53-15 of the Mississippi Code of 1972 and the Mississippi Insurance Commissioner's power have been critically impaired if not invalidated by the federal courts allowing the insurance companies to force petitioners to arbitrate their disputes.

II.

FIFTH CIRCUIT'S OPINION IS A CONTRADICTION

The Fifth Circuit held that because no Mississippi statute addresses, much less prohibits or restricts arbitration of credit insurance related claims, disputes or controversies, the Commissioner of Insurance for the State of Mississippi is without regulatory authority to prohibit arbitration clauses relating to insurance.

However, in referring to a press release by the Mississippi Insurance Commissioner found in a footnote in respondent's brief, the Fifth Circuit, incredibly and inexplicably contradicted itself on the same page of the opinion by stating that "the record indicates that the Commissioner can permit or disallow insurance disputes to be subject to arbitration as the Commissioner deems fit." This is precisely the point petitioners have been trying to make with the Court, which is a total contradiction to the Courts opinion in the first paragraph.

The Mississippi Insurance Commissioner issued the press release, dated October 2, 2001 announcing his approval of the first insurance policy filing to ever allow arbitration in Mississippi. This happened nearly three years after the execution of the arbitration agreements being considered by the Court and should not have been considered in deciding the case at bar.

The press release, which was not printed in the record and only referenced a website was incorrectly utilized by the Fifth Circuit in its decision.

However, it is important to note the press release announced that the Mississippi Insurance Commissioner permitted PrimeAmerica Life Insurance Co. to allow their Mississippi policy holders to pay a lower premium for a policy containing binding arbitration and to pay a higher premium for a policy preserving the policyholder's right to a trial by jury.

However, the fact that the Mississippi Insurance Commissioner is now allowing arbitration in limited cases is only relevant to show that the Mississippi Insurance Commissioner has the power, pursuant to § 83-53-15 and other sections of the Mississippi Code of 1972, to allow or prevent arbitration clauses in insurance policies issued in Mississippi. This is a power the Fifth Circuit ruled that the Mississippi Insurance Commissioner did not have.

III.

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS CONFLICTS WITH DECISION OF OTHER CIRCUITS

The Fifth Circuit Court of Appeals decision conflicts with decisions of other circuits. In the Eighth Circuit the Court held a party's remedies pursuant to RICO claim would frustrate and perhaps even supplant Minnesota's carefully developed scheme of administrative regulation. *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297 (8th Cir. 1997). The case held that RICO's treble damages and attorney's fees would eviscerate the Minnesota insurance administrative system by diverting aggrieved policyholders away from the Minnesota Insurance Commissioner's office into Federal court.

The Fifth Circuit decision herein has effectively allowed insurance companies doing business in Mississippi to evade the watchful eye of the Mississippi Insurance Commissioner by utilizing arbitration agreements contained in third party contracts and by filing motions to compel arbitration with federal courts, thereby emasculating the power of the Mississippi legislature, via the Insurance Commissioner, to regulate the business of insurance in Mississippi.

Another circuit that has held that a state's comprehensive scheme or system of regulating insurance would be invalidated by a federal law is the Tenth Circuit in *Grimes v. Crown Life Ins. Co.*, 852 F.2d 699 (10th Cir. 1988) where the appeals court held that the district court should have abstained from action because of Oklahoma's comprehensive scheme to regulate insurance and to not infringe on such a fundamental and important question of state law and policy. *Grimes* at 705.

The case of *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564 (1974) put forward that a state's entire statutory scheme can be utilized to invoke McCarran-Ferguson Act protection. It held that "The McCarran-Ferguson Act does not require an examination into the regulatory status of every detail of the business of insurance; it is sufficient if the state's regulatory scheme is comprehensive and meaningfully administered; however the statutory provision may not be mere pretense." *Schwartz* at 575.

IV.

PETITIONERS ARE ENTITLED TO A JURY TRIAL

1. In the case at bar, the arbitration provision waives the petitioner's state and federal constitutional right to a jury trial or a bench trial, their right to collect punitive damages from the respondents and effectively forecloses their right to access to the courts of Mississippi, a right guaranteed by the Constitution of the State of Mississippi and by Article VII of the United States Constitution.

Article 3 Section 24 of the Mississippi Constitution of 1890 provides that for every injury there shall be a remedy, "all courts shall be open; and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law and right and justice shall be administered without sale, denial or delay."

Article 3, Section 25 of the Mississippi Constitution of 1890 provides that the courts shall be open to all people: "No person shall be debarred from prosecution or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both."

Finally, Article 3, Section 31 provides: "The right of trial by jury shall remain inviolate . . .".

The arbitration agreement in the present case effectively forecloses the petitioner's constitutional right to have a judicial remedy for any wrong which they may have suffered at the hands of Respondents. Further the arbitration clause expressly limits their right to collect punitive damages. Mississippi courts have held that, "Clauses limiting liability are given rigid scrutiny by the courts and will not be enforced unless the limitation is fairly and honestly negotiated and understandingly entered into." *Farragut v. Massey*, 612 So. 2d 325, 330 (Miss. 1992) (quoting 17 Am. Jur. 2d Contracts § 297, at 298 n.74 (1991).

The Mississippi Constitutional guarantees apply to all contracts, including ones containing arbitration agreements.

The arbitration agreement in question is a waiver of a party's right to a trial by jury under both Amendment VII of the United States Constitution and the Mississippi Constitution. Regardless of the federal courts' policy favoring arbitration, there is nothing in the FAA that would permit such a waiver unless it is made knowingly, willingly, and voluntarily. *Allstar Homes, Inc. v. Waters*, 711 So. 2d 924, 929 (Ala. 1997).

Mississippi courts hesitate to disturb agreements that knowledgeable and experienced parties freely enter into. *IP Timberlands Operating Co. v. Denmiss*, 726 So. 2d 96 (Miss. 1998). However, conversely, the courts may disturb an arbitration agreement entered into between parties of unequal bargaining power, unequal knowledge and involving boilerplate contracts of adhesion.

It is important to note that the petitioners are the only ones giving up their constitutional rights. The arbitration agreement allows respondent lender to foreclose, replevin or file a lawsuit to collect any unpaid amounts. There is no mutuality of obligation with respect to the arbitration agreements herein.

Additionally, the FAA was intended to require federal courts to enforce arbitration agreements between large commercial entities, it was not intended to apply to state courts at all. *Southland Corp. v. Keating*, 465 U.S. 1, 26 (1984) (O'Connor, J. dissenting).

2. Petitioners are entitled to a jury trial on the making of the arbitration agreements. 9 U.S.C. § 4 states in pertinent part that, "if the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof." *Moses H. Cone Hospital v. Mercury Const. Corp.*, 460 U.S. 1, 36 (1983) states that "Section 4 of the Arbitration Act gives the hospital the right to trial (on the issue of arbitrability)." Implicit within that right is the right to perform discovery relevant to the validity of the arbitration agreements.

The Mississippi Supreme Court rendered a decision on July 18, 2002, *East Ford v. Taylor*, 2000-IA-01527-SCT (Miss. 7-18-2002) in which an arbitration agreement similar to the one in question in the present case, was rendered unenforceable due to both procedural and substantive unconscionability. The Mississippi Court defined unconscionability as "absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party." The Court went on to state, " unconscionability is most strongly shown in contracts of adhesion presented to a party on a take it or leave it basis." and in contracts, "containing complex, legalistic language, with a disparity of sophistication of the parties and lack of opportunity to study the contracts."

Had petitioners been given their right to a trial pursuant to § 4 of the FAA, they feel confident that they could have proven the arbitration agreements herein to be unconscionable.

V.

THE ARBITRATION AGREEMENTS ARE UNENFORCEABLE DUE TO THE HIGH COSTS OF ARBITRATION

The petitioners herein filed a lawsuit against respondents seeking $1,000,000 for compensatory damages and $5,000,000 in punitive damages. According to the arbitration fee schedule contained in the Court record below but not part of the arbitration agreement, petitioners would have to pay a filing fee of $8,500 plus a case service fee of $2,500 just to file a similar claim in an arbitral forum. Additionally, the arbitration agreement provides that the non-prevailing party shall pay any costs for all other arbitration expenses and fees other than costs of one day of arbitration proceedings. There is a likelihood the impecunious petitioners, one of whom exists on a $530 per month SSI disability check, would incur $11,000 in filing fees in addition to costs for the arbitrator and expenses in the event the case lasted more than 8 hours and the petitioners lost the arbitration.

The petitioner in this example would have to pay his entire SSI check for 20 3/4 months just for the "right" to arbitrate.

Many courts have held arbitration agreements unenforceable because the costs were too high. *See, e.g., Shankle v. B.G. Maintenance Management, Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999); *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465, 1483-89 (D.C. Cir. 1997).

The case of *Green Tree Financial Corp. v. Randolph*, 121 S. Ct. 513 (2000) held that the existence of large arbitration costs could preclude a litigant from effectively vindicating their federal statutory rights in the arbitral forum. *Green Tree* went on to hold that where a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.

In the case at bar, petitioners have demonstrated that it is probable they would have to pay significant costs in order to arbitrate their claim to conclusion.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND CONCURRING OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JUNE 14, 2002

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 01-60678, 01-60679, 01-60680, 01-60681, and 01-60682

AMERICAN HERITAGE LIFE INSURANCE COMPANY; FIRST COLONIAL INSURANCE COMPANY OF FLORIDA; FIDELITY NATIONAL INSURANCE CORPORATION, doing business as Republic Finance, Inc.

Plaintiffs-Appellees

-vs-

JOHN D. ORR, BETTY E. SANFORD, FRANKIE L. MOORE, JIMMIE MARTIN and NATHANIEL HENLEY,

Defendants-Appellants

Appeals from the United States District Court
for the Northern District of Mississippi

Before WIENER and DENNIS, Circuit Judges, and LITTLE, District Judge.*

LITTLE, District Judge:

Today we consider a consolidated appeal by Defendants-Appellants from the district court's order in favor of

* Chief District Judge of the Western District of Louisiana, sitting by designation.

Plaintiffs-Appellees, compelling arbitration. Defendants-Appellants include the following parties: John D. Orr, Betty F. Sanford, Frankie L. Moore, Jimmie Martin, and Nathaniel Henley (collectively referred to as the "Appellants"). Plaintiffs-Appellees are: Fidelity National Corporation d/b/a Republic Finance, Inc. ("Republic Finance" or the "Lender"), and American Heritage Life Insurance Company ("American Heritage") and First Colonial Insurance Company of Florida ("Colonial Insurance") (collectively, the "Insurers").[1] The district court granted Plaintiffs-Appellees' petition to compel arbitration under § 4 of the Federal Arbitration Act (the "FAA"), stayed the pending state court proceedings, and ordered the case closed. 9 U.S.C. § 4.

Although the Appellees are the beneficiaries of the district court's ruling that compelled arbitration, they are appellants as to one issue: Whether this court has jurisdiction to entertain Appellants' appeal. This issue will be disposed of first, and consideration of the portions of the district court's order that the Appellants find wanting will follow.

We ultimately hold that, as a matter of law, the district court order compelling arbitration, which also stays the underlying state court proceedings and closes the case in federal court, is an immediately appealable, final decision under the ambit of 9 U.S.C. § 16(a)(3) of the FAA. As such, this court has jurisdiction to entertain the instant appeal. We also conclude that the district court's order should be affirmed.

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1. Republic Finance, American Heritage, and Colonial Insurance will be referred to collectively as "Appellees."

Appendix A

I. FACTS AND PROCEEDINGS

Over the past several years, Appellants obtained consumer loans from Republic Finance, which included the purchase of credit life and credit disability insurance. Specifically, when Appellants entered into loan transactions with Republic Finance, Republic Finance sold Appellants disability life insurance to insure the credit against the risks of sickness and death. The Insurers wrote and issued the insurance policies that Republic Finance sold to Appellants.

At the loan closings, the borrowing Appellant and Republic Finance signed a document entitled "Arbitration Agreement" (the "Agreement") to which the Insurers were not signatories. Appellants do not contend that Republic Finance failed to prepare the Agreement in clear language and legible print, or that Republic Finance neglected to place the Agreement on a separate page, that is, apart from the loan transaction documents. Each Agreement contains the following language:

> [A]ny claim, dispute or controversy between undersigned . . . and lender (or the employees, agents or assigns of lender) arising from or relating to the loan or any prior extension of credit by lender to any of the undersigned, insurance written in connection herewith, . . . and whether in tort, contract, breach of duty (including but not limited to) any alleged fiduciary, good faith, and fair dealing duties, including but not limited to the applicability of this arbitration agreement, and the validity of the entire agreement shall be resolved

> by binding arbitration before one arbitrator in accordance with the Federal Arbitration Act, the expedited procedures of the commercial arbitration rules of the American Arbitration Association, and this agreement.
>
> . . . .
>
> The parties agree that Lender is engaged in interstate commerce, and the transaction is governed by the Federal Arbitration Act, 9 U.S.C. Section 1- 16.
>
> . . . .
>
> In the event either party files a suit of any kind in any court against the other, or if a counter or cross-claim is filed therein, the defendant or counter-defendant can have the suit stayed and the other party required to arbitrate under this agreement.

Directly above the date and signature lines, in bold, capital, readily legible letters, is the following language.

> **THE PARTIES UNDERSTAND THAT BY SIGNING THIS ARBITRATION AGREEMENT, THEY ARE LIMITING ANY RIGHT TO PUNITIVE DAMAGES AND GIVING UP THE RIGHT TO A TRIAL IN COURT, BOTH WITH AND WITHOUT A JURY.**

Appendix A

Despite the clear language of the Agreements' provisions mandating arbitration under the FAA and the commercial rules of the American Arbitration Association ("AAA"), Appellants commenced a civil action against Appellees in the Circuit Court of Clay County, Mississippi. Appellants sought monetary damages for, among other alleged transgressions, fraudulent misrepresentation in connection with the loan transaction, conspiracy to "sell credit life, credit disability, property and/or collateral protection insurance . . . that was unnecessary and at an exorbitant premium far in excess of the market rate," breach of implied covenants of good faith and fair dealing, breach of fiduciary duties, and allegations that the Insurers conspired with agents of Republic Finance to sell unnecessary insurance at inflated rates.

Appellees initiated independent actions in the United States District Court, Northern District of Mississippi, only seeking orders of the court to compel arbitration under the FAA, 9 U.S.C. § 1 *et seq.* and to stay the state court proceedings. After an appropriate analysis of the Appellants' demands and the Appellees' oppositions to them, the district court issued an order compelling arbitration in accordance with the Agreements, staying all related, state court proceedings, and closing the case. The district court determined that Appellants' claims implicated substantially interdependent and concerted misconduct by both the non-signatory Insurers and the signatory Lender. The district court also concluded that: (1) the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. § § 1011-1015 (1999) (the "McCarran-Ferguson Act") did not reverse-preempt the FAA because Appellants failed to identify a Mississippi state law

or statute that the FAA had invalidated, impaired, or superseded; (2) Appellees' petition to compel arbitration in the district court did not amount to a compulsory counterclaim under rule 13(a) of the Federal Rules of Civil Procedure (the "FRCP"), which would have required Appellees to file the motion to compel arbitration in state court, and that § 4 of the FAA plainly authorized a party against whom litigation has been initiated to commence a separate, original action in federal district court to enforce an arbitration agreement; and (3) Appellants did not proffer sufficient evidence to support a jury trial demand for resolution of the factual issues surrounding the adoption of the Agreements. Of particular importance in the instant dispute is the fact that, in addition to compelling arbitration and staying the pending state court proceedings, the district court ordered the case closed but did not dismiss the action. The final, substantive paragraph of the district court's order provides as follows: "[T]his case is CLOSED." Appellants timely filed notices of appeal.

II. JURISDICTION

A District Court Order That Compels Arbitration, Stays the Underlying State Court Proceedings, and Closes the Case is an Immediately Appealable, Final Decision Within the Contemplation of § 16(a)(3) of the FAA.

Section 16(a)(3) of the FAA provides as follows: "An appeal may be taken from a final decision with respect to an arbitration that is subject to this title." 9 U.S.C. § 16(a)(3). That section preserves immediate appeal of any

" 'final decision' with respect to arbitration," regardless of whether the decision is favorable or hostile to arbitration. *Id.* The FAA does not, however, expressly define the term "final decision." Appellees argue that this court lacks appellate jurisdiction because the district court did not issue an immediately appealable "final decision." Specifically, Appellees maintain that because the district court's order compelled arbitration and "closed" the case instead of compelling arbitration and "dismissing" the case, this court lacks jurisdiction to hear the appeal of the ruling of the district court. Appellees cite *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000) for the proposition that "closing" a case neither ends the litigation on the merits nor terminates the district court's involvement in the matter, thereby precluding this court's appellate jurisdiction over the dispute. 531 U.S. at 85, 121 S.Ct. at 519. Conversely, Appellants also rely on *Green Tree*, but for the proposition that, in the instant dispute, "closing" a case is the functional equivalent of "dismissing" it. Appellants argue that by compelling arbitration and "closing" the case, the district court issued an immediately appealable, final decision under § 16(a)(3) because the court's order ended the entire litigation on the merits in that court, leaving nothing more for that court to do but execute the judgment. *Id.*

In *Green Tree*, the Supreme Court held that an order dismissing an action is a "final decision" within the traditional understanding of the term, even when the dismissal is in favor of arbitration and the parties could later return to court to enter judgment on an arbitration award. *Id.* at 85-88, 121 S.Ct. at 519-21. In reaching this result, the Supreme Court applied the well-established meaning of "final

decision" as one that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment." *Id.* at 85; 121 S.Ct. at 519 (citing *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994)), and *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (both quoting *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945)). The *Green Tree* Court concluded that the reference in 9 U.S.C. § 16(a)(3) to "a final decision with respect to an arbitration that is subject to this title" authorizes appeals from final orders that grant or deny arbitration. *Green Tree*, 531 U.S. at 89, 121 S.Ct. at 521. No longer is it necessary to conduct an analysis of whether a lawsuit is an "independent" action, brought solely to enforce arbitration rights, or an action in which the request to arbitrate is "embedded" in a case that also raises substantive legal claims. *Id.* at 88, 121 S.Ct. at 520. By distinguishing the terms "dismiss" and "close" as they apply to disposition of a case, Appellees attempt to thwart the Court's instruction in *Green Tree* to apply the well-established meaning of "final decision." Appellees contend that the standards for appeal from a dismissal are different from the standards for appeal from orders closing the case.

There is no practical distinction between "dismiss" and "close" for purposes of this appeal. The application of each word results in a termination on the merits, leaving the judgment-rendering court with nothing more to do but execute the judgment. We hold that where a district court with nothing before it but whether to compel arbitration and stay state court proceedings issues an order compelling arbitration, staying the underlying state court proceedings,

and closing the case, thereby effectively ending the entire matter on its merits and leaving nothing more for the district court to do but execute the judgment, appellate jurisdiction lies, as the decision is "final" within the contemplation of § 16(a)(3) of the FAA. Thus, we hold that this court has jurisdiction to entertain the instant appeal.

III. SUBSTANTIVE ISSUES

Appellants assert that the district court erred by: (1) finding that the McCarran-Ferguson Act did not reverse-preempt the application of the FAA to the instant case; (2) denying Appellants a trial by jury to decide the factual issues surrounding the validity of the Agreements; and (3) failing to declare the Agreements unenforceable because of the putative high cost of arbitration. For the reasons hereafter set forth, we find no merit in any issue raised by Appellants.

A. *Standard of Review*

We review a district court's grant of a motion to compel arbitration *de novo*, applying the same standard as the district court. *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 445 (5th Cir. 2001) (citing *Local 1351 Int'l Longshoremen's Ass'n v. Sea-Land Serv., Inc.*, 214 F.3d 566, 569 (5th Cir. 2000), *cert. denied*, 531 U.S. 1076, 121 S.Ct. 771, 148 L.Ed.2d 670 (2002)); *PaineWebber, Inc. v. Chase Manhattan Private Bank*, 260 F.3d 453, 459 (5th Cir. 2001); *Pennzoil Exploration & Prod. Co. v. Ramco Energy, Ltd.*, 139 F.3d 1061, 1065 (5th Cir. 1998).

B. *The McCarran-Ferguson Act Did Not Reverse-Preempt the Application of the FAA to the Agreements.*

Appellants' first argument is that the FAA is inapplicable to the instant Agreements, because the FAA is precluded or preempted by the McCarran-Ferguson Act, 15 U.S.C. § 102 (the "Act"). The Act provides the following:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . .

15 U.S.C.A. § 1012(b). The Act bars application of the FAA to insurance contracts only in the context of a *state statute* evincing the same, not mere policy statements of state officials or administrative rule interpretations of governmental entities. *See Miller v. Nat'l Fidelity Life Ins. Co.*, 588 F.2d 185, 186-87 (5th Cir. 1979). The party seeking to avail itself of the Act must demonstrate that application of the FAA would invalidate, impair, or supersede a particular *state law* that regulates the business of insurance. *Id.* at 187. "The test under McCarran-Ferguson is not whether a state has enacted statutes regulating the business of insurance, but whether such state statutes will be invalidated, impaired, or superseded by the application of federal law." *Id.* Appellants fail to identify any statute that would be impaired, invalidated, or superseded by the application of the FAA. Instead, Appellants try to perpetrate a judicial end-run by asserting that an attorney general's opinion or insurance department's regulatory, administrative policy is the functional equivalent of a state law relating to insurance, thereby triggering the provisions of the Act. Appellants' arguments are without merit.

First, "[o]pinions of the Mississippi Attorney General do not have the force of law. . . ." *Frazier v. Lowndes County, Mississippi Bd. of Educ.*, 710 F.2d 1097, 1100 (5th Cir. 1983) (citing *Local Union No. 845, United Rubber, Cork, Linoleum and Plastic Workers of Am., Home Assoc. v. Lee County Bd. of Supervisors*, 369 So.2d 497, 498 (Miss. 1979)). Second, because no Mississippi statute addresses, much less prohibits or restricts, arbitration of credit insurance-related claims, disputes, or controversies, the Commissioner of Insurance for the State of Mississippi (the "Commissioner") is without regulatory authority to prohibit arbitration clauses relating to insurance. Appellants espouse a variety of administrative rulings by the Commissioner that disallowed arbitration of all insurance-related claims as proof that insurance claims are never subject to arbitration in the State of Mississippi. In their brief, Appellants state the following: "There is no evidence herein that the Commissioner has ever approved an insurance policy, certificate, or endorsement or any form containing provisions for mandatory and binding arbitration. Consequently, the use of a mandatory, binding arbitration agreement, even though contained in a third-party contract . . . is unlawful in Mississippi." Appellees, however, have submitted into the record a press release issued by the Commissioner on 2 October 2001, which states, in pertinent part, the following:

> **[Commissioner] announces first policy filing allowing arbitration.**
> [The] Commissioner . . . approve[d] a filing by Primerica Life Insurance Company containing an arbitration provision. This provision would require certain disputes to be resolved through the

> process of arbitration rather than in the court system. In the event of a dispute, instead of a lawsuit being filed, an independent and neutral arbitrator licensed to practice law in Mississippi would render a decision after hearing the position of the parties. . . . The arbitrator's decision would be final and binding on both the policyholder and Primerica Life Insurance Company.[2]

As the record indicates, Appellants' contention that the Commissioner never permits insurance disputes to be subject to arbitration is incorrect. The record indicates that the Commissioner can permit or disallow insurance disputes to be subject to arbitration as the Commissioner deems fit.

Based upon the clear meaning of 15 U.S.C.A. § 1012(b), we hold that the district court properly concluded that the Act does not apply, and that under the FAA, the Agreements are valid, enforceable, and irrevocable. *See Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1360 (10th Cir. 1971); *Hamilton Life Ins. Co. of N.Y. v. Republic Life Ins. Co.*, 408 F.2d 606, 611 (2nd Cir. 1969).

C. *Appellants Are Not Entitled to a Jury Trial Regarding the Validity of the Agreements.*

Second, Appellants maintain that under §§ 2 & 4 of the FAA, they are entitled to a trial by jury on the issue of arbitrability. Section 2 of the FAA states, in pertinent part, that an arbitration clause involving interstate commerce is

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2. *See* Mississippi Insurance Department website: *www.doi.state.ms.us*, 2 October 2001.

"valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA also provides that "[i]f the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4.

1. *Right to a Jury Trial Under § 4 of the FAA.*

Appellants contend that they deserve a jury trial on the question of the validity of the Agreements. Specifically, by alleging that the Agreements are unconscionable, the products of unequal bargaining power between the parties, lacking mutuality of obligation between the parties, and failing to result in a meeting of the minds, Appellants argue that they have put the "making" of the Agreements in issue, thereby complying with § 4 of the FAA. The district court held, however, that the issues raised by Appellants relate to enforceability of the Agreements, but do not impact the "making of the arbitration" agreement. We agree with the district court's holding and rationale.

Although the FAA permits parties to demand a jury trial to resolve factual issues surrounding the making of an arbitration agreement, or the failure, neglect, or refusal to perform the agreement, it is well-established that "[a] party to an arbitration agreement cannot obtain a jury trial merely by demanding one." *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1154 (5th Cir. 1992). Further, under the *Dillard* analysis, a party contesting the "making" of the arbitration agreement must "make at least some showing that under prevailing law, he would be relieved of his contractual obligations to arbitrate if his allegations

proved to be true . . . [and] produce some evidence to substantiate his factual allegations." *Id.* at 1154.

In the instant case, Appellants submitted evidence in the form of affidavits that claim, *inter alia*, that Appellees did not explain the Agreements to Appellants or that Appellants did not realize that they were waiving a trial by jury. The affidavits proffered by Appellants, however, amount to nothing more than hollow, bald assertions that do not approach fraud in the "making" of the Agreements. *See Bhatia v. Johnston*, 818 F.2d 418, 421-22 (5th Cir. 1987) (stating that self-serving affidavits do not amount to the type of evidence required to call the "making of the arbitration" agreement into question). Furthermore, Appellants' affidavits fail to identify any misrepresentation by Appellees peculiar to the Agreements, which forecloses Appellants' ability to state a claim of fraud in the inducement. *See Burden v. Check into Cash of Kentucky, LLC*, 267 F.3d 483, 491 (6th Cir. 2001). Other than their self-serving affidavits, Appellants have not submitted a whisper of evidence to support the conclusion that a jury trial is warranted under § 4 of the FAA. Raising issues of the Agreements' procedural or substantive unconscionability, as Appellants have in the instant case, is not the equivalent of questioning the "making" of an arbitration agreement. *See Burden*, 267 F.3d at 492. Under § 4 of the FAA and *Dillard*, therefore, Appellants have not met their burden to show their entitlement to a jury trial.

2. *The Seventh Amendment Right to a Trial by Jury.*

Next, Appellants claim that by forcing them to submit their claims to an arbitrator, the district court deprived them

of their Seventh Amendment right to a trial by jury. Appellants suggest that the waiver of a constitutional right should be closely scrutinized, and that a waiver of jury trial rights must be clearly and unmistakably expressed.

Appellants' argument is without foundation. First, we point out that Appellants agreed to submit to arbitration because they assented to the terms of the Agreements, which contained the following clause, located just above the signature lines:

> **THE PARTIES UNDERSTAND THAT BY SIGNING THIS ARBITRATION AGREEMENT, THEY ARE LIMITING ANY RIGHT TO PUNITIVE DAMAGES AND GIVING UP THE RIGHT TO A TRIAL IN COURT, BOTH WITH AND WITHOUT A JURY.**

Therefore, by agreeing to arbitration, Appellants have necessarily waived the following: (1) their right to a judicial forum; and (2) their corresponding right to a jury trial.

Nevertheless, Appellants cite *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 119 S.Ct. 391, 142 L.Ed.2d 361 (1998), for the proposition that an arbitration provision that waives jury trial rights must be clearly and unmistakably expressed. Reliance on *Wright*, however, is unavailing. Appellants acknowledge that the Supreme Court limited its holding in *Wright* to the context of a *collective bargaining agreement*, not to an *individual's* waiver of his own rights — a situation in which the "clear and unmistakable" standard is not applicable. *Id.* at 80-81, 119

S.Ct. at 401-02. Thus, outside the area of collective bargaining, in which a third party (the union) seeks to waive contractually the rights of an individual member (the employee), there is no requirement that an arbitration provision must clearly and unmistakably express the waiver of an individual's rights. *Williams v. Imhoff*, 203 F.3d 758, 763 (10th Cir. 2000).

Appellants further cite the talisman of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) in support of their contention that a waiver of a constitutional right must be voluntarily, knowingly, and intelligently made. *Miranda*, however, is totally inapposite to the instant case, because *Miranda* is limited to the protection of the Fifth Amendment rights of criminal defendants after arrest and does not trigger the application of the Seventh Amendment right to a jury trial in a civil case.

The Seventh Amendment right to a trial by jury is limited by a valid arbitration provision that waives the right to resolve a dispute through litigation in a judicial forum. We concur with the following reasoning:

> The Seventh Amendment does not confer the right to a trial, but only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes.

Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 957 F.Supp. 1460, 1471 (N.D. Ill. 1997). Here, Appellants agreed

to resolve their disputes with Appellees through arbitration, and they did so in clear and unmistakable, capitalized and boldfaced words which expressly waived their right to a jury trial as well. Thus, Appellants validly waived their rights to a judicial forum, including the corollary right to a trial by jury.

D. *The Agreements Are Not Unenforceable Because of the Alleged High Cost of Arbitration.*

Third, Appellants contend that the filing and case service fees for arbitration are oppressive, present a hardship, and are unconscionable, thereby rendering the Agreements unenforceable. As to the potentially burdensome costs of arbitration, the party resisting arbitration has the burden of showing the likelihood that "arbitration would be prohibitively expensive." *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 81, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). Appellants assert that they would not be able to afford the fees associated with arbitration under the fee schedule and rules of the AAA.

First, this testimony alone is not sufficient to render the Agreements unconscionable. *See Williams v. Cigna Fin. Advisors*, 197 F.3d 752, 764-65 (5th Cir. 1999), *cert. denied*, 529 U.S. 1099, 120 S.Ct. 1833, 146 L.Ed.2d 777 (2000). In *Williams*, this court held that, without more, the mere possibility that a party may have to share in the payment of the arbitrator's fees is not a sufficient reason to invalidate an arbitration agreement. *See id.* at 764. Furthermore, when a party fails to specify excessive arbitration costs and instead speculates that a "risk" exists that the party will be saddled

with prohibitive costs of the arbitration proceeding, a court is not required to invalidate the arbitration agreement. *Green Tree*, 531 U.S. at 90-91, 121 S.Ct. at 522. Interestingly, to date, Appellees, not Appellants, have assumed the cost of initiating the arbitration.

Second, the Agreements provide the following: "the party requesting arbitration shall at that time pay the arbitrator $125.00. Lender shall pay arbitrator all other arbitration fees and expense costs for up to one day (eight hours) of proceedings. Any other such costs shall be paid by the non-prevailing party. . . ." According to the record, to date, only Appellees have paid the appropriate fees; however, if Appellees prevail, then Appellants must pay all costs and expenses of arbitration. Presently, the question of which party to the arbitration will ultimately prevail at arbitration is subject to speculation only and, therefore, is not a basis to hold the Agreements unenforceable.

Appellants' reliance on *Shankle v. B.G. Maint. Mgmt., Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999) and *Cole v. Burns Int'l Sec. Services Co.*, 105 F.3d 1465, 1483-89 (D.C. Cir. 1997) is misplaced. In each case, the court addressed an arbitration agreement that did not expressly specify which party would pay the arbitrator's fees or whether an arbitrator's fees could be waived or reduced in cases of hardship. *See Cole*, 105 F.3d at 1483-89. This case, however, is distinguishable from *Coles*, because the Agreements expressly state who shall pay the arbitration fees. Moreover, the rules of the AAA provide Appellants sufficient avenues to request fee-paying relief, if necessary. *See* Rule R-51, Commercial Arbitration Rules.

The mere fact that Appellants face the possibility of being charged arbitration fees, including paying the arbitrator's fee if directed to do so by the arbitrator, does not render the Agreements unenforceable. Accordingly, Appellants have failed to demonstrate that the Agreements' provision relating to fees is unconscionable simply because Appellants may eventually have to pay a portion of the arbitrator's fees.

IV. CONCLUSION

For the foregoing reasons, the district court's order compelling arbitration, staying the state court proceedings, and closing the case is AFFIRMED.

DENNIS, Circuit Judge, concurring:

I concur fully in Chief Judge Little's excellent opinion and write separately only to elaborate on the reasons why we have appellate jurisdiction over this matter.

The Federal Arbitration Act ("FAA") permits appeal of any "final decision with respect to an arbitration" that is subject to the Act. 9 U.S.C. § 16(a)(3). On the other hand, "[e]xcept as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order . . . (1) granting a stay of any action under section 3 of this title; [or] (2) directing arbitration to proceed under section 4 of this title. . . ." 9 U.S.C. § 16(b)(1)-(2).[1] Thus, an order compelling arbitration is appealable only if it is a final order. In other words, the finality of the district court's order determines this court's jurisdiction over the present appeal.

Prior to the Supreme Court's opinion in *Green Tree Financial Corp.—Alabama v. Randolph*, 531 U.S. 79 (2000), this circuit established that "[t]he appropriate test of finality is whether the order involved an independent or embedded proceeding. An order involving an embedded proceeding is always an interlocutory order; an order involving an independent claim is always final." *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996). The *Altman Nursing* court explained the independent/embedded distinction as follows: "'Generally, if the only issue before the court is the dispute's arbitrability, the action is considered independent and a court's decision on that issue

1. Appellate review is permitted under the 28 U.S.C. § 1292(b) exception if the district court certifies an order for immediate appeal.

constitutes a final decision. If, however, the case includes other claims for relief, an arbitrability ruling does not end the litigation on the merits, but is considered interlocutory only.' " *Id.* (quoting *McDermott Int'l, Inc. v. Underwriters at Lloyds*, 981 F.2d 744, 747 (5th Cir. 1993)).

In *Green Tree*, the Court established a different analytical framework for determining whether an arbitration order is an appealable "final decision" or an unappealable "interlocutory order." "The Court held that an order dismissing an entire action with prejudice and ordering arbitration is an appealable final decision under § 16(a)(3), regardless of whether the action would be deemed 'independent' or 'embedded' by courts, like ours, that embraced that distinction." *Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90, 92 (2d Cir. 2002).[2] Rather, the Court applied the "well-developed and longstanding" definition of "final decision": "It is a decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment." *Green Tree*, 531 U.S. at 86 (internal quotation and citations omitted). The Court further noted, however, that, "[h]ad the District Court entered a stay instead of a dismissal in this case, that order would not be appealable." *Id.* at 87 n.2.

Here, the district court entered an order in each action that (1) compelled arbitration under section 4 of the FAA, (2) stayed the state-court proceedings, and (3) closed the case. Each component of those orders merits brief discussion.

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2. The *Green Tree* case would have qualified as an "embedded" proceeding under our definition of that term in *Altman Nursing*.

First, in *Green Tree*, the Supreme Court returned our jurisdictional analysis to the "plain language of the statutory text" of the FAA. *See id.* at 88. Section 4 of the FAA permits a party seeking to compel arbitration to file suit solely for that purpose. *See* 9 U.S.C. § 4; *see also* Edith H. Jones, *Appeals of Arbitration Orders — Coming Out of the Serbonian Bog*, 31 S. TEX. L. REV. 361, 373-76 (1990). When a decision on arbitrability is the sole object of a civil action, the district court's determination of that issue amounts to an immediately appealable "final decision" because it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." In this case, the Appellees filed independent actions in the district court. By compelling arbitration, the court resolved the only issue before it in each action. The orders are therefore final decisions, and we have jurisdiction to hear this appeal under section 16(a)(3) of the FAA.

Second, the stay of the state-court proceedings does not impact our jurisdictional analysis. Although section 3 of the FAA allows courts to stay litigation brought before them, the statute does not authorize federal courts to enjoin ongoing state proceedings.[3] Consequently, the district court did not

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3. *See* Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U. PA. L. REV. 91, 114 (1998) ("Nothing in either the language or the legislative history of the FAA shows that Congress intended to allow federal courts to enjoin state actions to support the enforcement of arbitration agreements."). The district court's authority to issue arbitral antisuit injunctions directed at state-court proceedings derives, instead, from the All Writs Act, 28 U.S.C.

(Cont'd)

grant "a stay of any action *under section 3* of this title. . . ." 9 U.S.C. § 16(b)(1) (emphasis added). More importantly, because the district court reached final decisions with respect to arbitration, the stay component of its orders did not transform them into unappealable "interlocutory order[s]" under section 16(b). *See Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 667-68 (5th Cir. 1994). "There is nothing interlocutory about an order compelling arbitration that does all that the court has to do." *Clarendon Nat'l Ins. Co. v. Kings Reinsurance Co.*, 241 F.3d 131, 135 (2d Cir.

(Cont'd)

§ 1651(a). *Id.* at 146. Congress, however, has limited the injunction power conferred by the All Writs Act. The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The district court based its stay on the third exception contained in the Anti-Injunction Act, stating that "a stay is required to protect or effectuate this court's judgment and order that the controversy between the parties be submitted to arbitration." Because an order compelling arbitration entered in an independent proceeding is a final decision, it also qualifies as a "judgment" under the Anti-Injunction Act. *See* Sternlight, *supra*, at 170-77. *But cf. id.* at 177 (stating that the third exception "would not seem to apply where an entire case on the merits was filed in federal court"). Thus, the stay entered by the district court was valid as a matter of law. But this finding does not mean that the stay was "necessary as a matter of practicality." *Id.* "Once the federal court has issued an order compelling arbitration, parties would risk sanctions such as contempt of court by refusing to follow the order." *Id.* In short, federal courts should examine closely both the legality and the necessity of a stay pending arbitration prior to interfering with a state-court suit.

2001). Accordingly, the stay does not prevent us from exercising appellate jurisdiction.[4]

Third, in my opinion, the closure component of the orders reveals the district court's intention to both retain jurisdiction and *administratively* close the case. It is not uncommon for district courts to compel arbitration but also retain jurisdiction pending the arbitration for the purpose of addressing any subsequent motions to confirm, modify, or vacate the award.[5] But the retention of jurisdiction pending arbitration creates an administrative problem for the district court because the action is likely to remain dormant for an appreciable period of time, and chief judges (at both the appellate and district-court levels) have a sixth sense for cases that appear to be languishing. The administrative closure solves this problem

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4. Even if one of the parties to the arbitration agreement had successfully moved to stay the *federal-court* proceedings pending arbitration, our jurisprudence indicates that the district court's orders would still constitute immediately appealable final decisions. *See Sphere Drake*, 16 F.3d at 668 (holding, in an independent proceeding, that an order compelling arbitration that also stayed all federal and state litigation pending between the parties was final).

5. The federal courts of appeals have consistently found that district courts intend to retain jurisdiction when they stay proceedings pending arbitration. *See, e.g., Corion Corp. v. Chen*, 964 F.2d 55, 56- 57 (1st Cir. 1992); *see also Jolley v. Paine Webber Jackson & Curtis, Inc.*, 864 F.2d 402, 405 (5th Cir. 1989) ("While an order granting a stay postpones active litigation in the district court, it contemplates that the district court will retain jurisdiction to confirm, modify, or, in some cases, to renew the litigation despite the arbitration award."). Yet, in an independent proceeding, a stay would not affect the finality or appealability of an order compelling arbitration. *See supra* note 4.

by providing a vehicle for the district court to remove the case from its active files without making any final adjudication. *Lehman v. Revolution Portfolio L.L.C.*, 166 F.3d 389, 392 (1st Cir. 1999). Thus, the administrative closure reflects nothing more than the federal courts' overarching concern with tidy dockets; it has no jurisdictional significance.[6]

In an effort to cast their case in the same mold as *Green Tree*, the Appellants argue that an order closing a case issued in an independent proceeding is the functional equivalent of a dismissal.[7] If we were to accept their argument, however,

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6. *See Lehman*, 166 F.3d at 392 ("Properly understood, an administrative closing has no effect other than to remove a case from the court's active docket and permit the transfer of records associated with the case to an appropriate storage repository. In no event does such an order bar a party from restoring the action to the Court's active calendar upon an appropriate application.") (internal quotation and citation omitted). I acknowledge that the district court here did not specifically direct that the cases be "*administratively closed*." But a court's use of an imprecise or misleading label cannot alter the character of its action. *See id.* at 392 n.2 (treating a "procedural order of dismissal" as an administrative closure of the case).

7. In proceedings where the litigants place more than the issue of arbitrability before the district court, an order compelling arbitration and closing the case is not equivalent to a final judgment of dismissal. *See Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 61 (2d Cir. 1993); *see also ATAC Corp. v. Arthur Treacher's, Inc.*, 280 F.3d 1091 (6th Cir. 2002) (rejecting an argument that a perpetual stay coupled with a closing order does not differ from a final judgment of dismissal); *Corion Corp.*, 964 F.2d at 56-60 (holding that an order compelling arbitration, staying proceedings, and administratively closing the case is not final).

we would be attributing jurisdictional significance to a designation not sanctioned by the Federal Rules that is typically made for administrative or statistical convenience. This we cannot do. Although the Appellants prevail under the plain meaning of FAA section 16(a)(3), their "functional equivalent" argument lacks merit.

The Appellees, on the other hand, raise their own functional equivalent argument: they suggest that we treat the closure order as a stay order, which would, in turn, deprive us of appellate jurisdiction under footnote two of the *Green Tree* decision.[8] This argument likewise fails, for it loses sight of the final judgment rule. In an independent proceeding, an order that is otherwise final — such as those entered in the present case — does not lose its finality because the district court retains jurisdiction to supervise compliance with the order or to enforce an arbitration award. *Amgen, Inc. v. Kidney Ctr. of Delaware County, Ltd.*, 95 F.3d 562, 566 (7th Cir. 1996) ("[A]n order in an independent proceeding can still be final even if the district court retains jurisdiction over the case to supervise compliance with the order."); *North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 63 F.3d 160, 164 (2d Cir. 1995); *University Life Ins. Co. of Am. v. Unimarc Ltd.*, 699 F.2d 846, 848-50 (7th Cir. 1983). Moreover, even if the district court had stayed these independent proceedings pending arbitration, the order compelling arbitration would still resolve the only issue before the court in each action, and therefore an immediate appeal from the order would still be permitted. *See supra* note 4. In short, even though the

8. *See Green Tree*, 531 U.S. at 87 n.2. ("Had the District Court entered a stay instead of a dismissal in this case, that order would not be appealable.").

district court probably intended to retain jurisdiction over these actions, neither the retention of jurisdiction nor the closure of the cases affects appealability.[9]

Although immediate appeal from an order compelling arbitration may frustrate the oft-cited federal policy favoring arbitration, policy concerns must yield to the plain language of the statutory text of the FAA. *See Green Tree*, 531 U.S. at 85-89. *See also Corion Corp.*, 964 F.2d at 59 ("[I]mmediate appealability of an arbitration order in a lawsuit which seeks no more than an order directing arbitration is the price or consequence of the final judgment rule, for once the order to arbitrate enters, the court has disposed of the entire controversy then before it."). In this case, then, we have appellate jurisdiction under section 16(a)(3) of the FAA because the district court entered "final decision[s]" by compelling arbitration in actions brought solely for that purpose.

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9. The Appellees bravely complain that this appeal is impeding arbitration. Any delay, however, is of their own making. They decided to file independent actions in federal court instead of moving to compel arbitration in the earlier-filed state-court proceedings. This appeal is one of the consequences of that strategic decision.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION DATED AND FILED JUNE 28, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

No. 1:01CV80-D-A

AMERICAN HERITAGE LIFE INSURANCE COMPANY; FIRST COLONIAL INSURANCE COMPANY OF FLORIDA; and FIDELITY NATIONAL CORPORATION d/b/a REPUBLIC FINANCE, INC.

PLAINTIFFS

vs.

LARRY HARMON

DEFENDANT

OPINION

Presently before the court is the Plaintiffs' petition to compel arbitration pursuant to Section Four of the Federal Arbitration Act. In the petition, the Plaintiffs also seek to stay a state court proceeding brought in Clay County, Mississippi, by the Defendant against the Plaintiffs.

Upon due consideration, the court finds that the petition should be granted. In accordance with the parties' agreement, the Defendant's claims shall be submitted to arbitration, and the proceedings currently pending in the Circuit County of Clay County shall be stayed pending arbitration.

Appendix B

A. Factual and Procedural Background

The Defendant obtained a consumer loan from the Plaintiff Republic Finance, Inc., that included the purchase of credit life insurance from the Plaintiffs American Heritage Life Insurance Company and First Colonial Insurance Company of Florida. In connection with the loan transaction, the Defendant signed a document entitled "Arbitration Agreement." The Arbitration Agreement contains a mandatory arbitration provision, requiring that all claims or disputes between the parties in connection with the loan transaction be submitted to binding arbitration.

Despite the Agreement's arbitration provision, the Defendant commenced a civil action in the Circuit Court of Clay County, Mississippi, on November 17, 2000, seeking monetary damages for, *inter alia*, fraudulent misrepresentation in connection with the loan transaction. Then, on March 8, 2001, the Plaintiffs filed a petition in this court, pursuant to Section Four of the Federal Arbitration Act, seeking an order compelling arbitration and staying the pending state court proceedings. Thereafter, on May 25, 2001, the Plaintiffs filed briefs in support of their petition, placing all substantive issues before the court for adjudication.

B. Discussion

1. The Agreement's Arbitration Provision

The Federal Arbitration Act, 9 U.S.C. §§1 - 16 (1999) (the FAA), provides that a written provision in a contract that evidences a transaction involving commerce, to settle by arbitration a controversy arising out of that contract, is valid,

irrevocable, and enforceable. 9 U.S.C. §2 (1999). Section Four of the FAA specifically contemplates that parties, such as the Plaintiffs, that are aggrieved by another party's failure to arbitrate under a written agreement, may file an original petition in a United States District Court to compel that party to arbitrate their claims. 9 U.S.C. § 4 (1999). In addition, the FAA expresses a strong national policy in favor of arbitration, and any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Southland Corp. v. Keating*, 465 U.S. 1, 10, 105 S.Ct. 852, 857, 79 L. Ed. 2d 1 (1983); *Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453, 456 (5th Cir. 1998).

The Fifth Circuit has directed that courts are to perform a two-step inquiry to determine whether parties should be compelled to arbitrate a dispute. *R.M. Perez & Assocs., Inc. v. Welch*, 960 F.2d 534, 538 (5th Cir. 1992). First, the court must determine whether the parties agreed to arbitrate the dispute. Once the court finds that the parties agreed to arbitrate, it must then consider whether any federal statute or policy renders the claims nonarbitrable. *R.M. Perez*, 960 F.2d at 538. In conjunction with that inquiry, a party seeking to avoid arbitration must allege and prove that the arbitration provision itself was a product of fraud or coercion; alternatively, that party can allege and prove that another ground exists at law or in equity that would allow the parties' contract or agreement to be revoked. *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 680-81 (5th Cir. 1976).

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The parties do not dispute that their Arbitration Agreement contains the following mandatory arbitration provision:

> [A]ny claim, dispute or controversy between undersigned . . . and lender (or the employees, agents or assigns of lender) arising from or relating to the loan or any prior extension of credit by lender to any of the undersigned, insurance written in connection herewith, . . . and whether arising in tort, contract breach of duty (including but not limited to) any alleged fiduciary, good faith, and fair dealing duties, including but not limited to the applicability of this arbitration agreement, and the validity of the entire agreement shall be resolved by binding arbitration before one arbitrator in accordance with the Federal Arbitration Act, the expedited procedures of the commercial arbitration rules of the American Arbitration Association, and this agreement.

Arbitration Agreement at 1.

As for the first step in the court's analysis, whether all of the parties agreed to arbitrate the dispute, the court notes that two of the three Plaintiffs, American Heritage Life Insurance Company and First Colonial Insurance Company of Florida, are non-signatories to the Arbitration Agreement.

The Fifth Circuit has made clear, however, that a non-signatory to a contract containing an arbitration provision may compel arbitration against a signatory, when that

signatory "raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract." *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000). In this case, the Plaintiff insurers assert that although they are non-signatories to the Arbitration Agreement between the Defendant and the Plaintiff Republic Finance, Inc., they are nevertheless entitled to compel arbitration of the Defendant's claims against them because those claims are intertwined with the Defendant's claims against Republic Finance. The court agrees.

The complaint brought by the Defendant against the Plaintiffs in Clay County Circuit Court, Civil Action No. 2000-266, alleges that the Plaintiff insurers colluded and conspired with agents of Republic Finance to sell unnecessary insurance at inflated rates. Specifically, the complaint charges that the "Defendants [American Heritage, First Colonial and Republic Finance] entered into a civil conspiracy . . . to sell credit life, credit disability, property and/or collateral protection insurance . . . that was unnecessary and at an exorbitant premium far in excess of the market rate." *See* State Court Complaint at ¶ 76. Further, it is undisputed that the Defendant's claims against all of the Plaintiffs arise from the same transaction, involved the same participants and representations, and occurred at the same time and location. As such, the court finds that the Defendant's claims raise allegations of substantially interdependent and concerted misconduct by both the non-signatory insurers, American Heritage and First Colonial, and the signatory lender, Republic Finance. The non-signatory insurers, therefore, may compel arbitration of the claims against them in accordance with the Arbitration Agreement, pursuant to the Fifth Circuit's ruling in *Grigson*.

As such, the court finds that the parties agreed to arbitrate all of the Defendant's claims. The arbitration clause is unambiguous, sufficiently broad to cover all of the Defendant's claims, and susceptible to only one interpretation — that the parties intended to settle, through arbitration, the claims the Defendant has raised. None of the Defendant's claims fall outside the scope of the arbitration clause.

As for the second step in the court's analysis, the Defendant argues that the claims are nonarbitrable for several reasons, including (i) the FAA is reverse-preempted by the McCarran-Ferguson Insurance Regulation Act; (ii) the Plaintiffs' demand for arbitration constitutes a compulsory counterclaim that could only have been brought in the Defendant's pending Clay County state court action; and (iii) the Defendant's demand for a jury trial in this matter renders an order compelling arbitration inappropriate. For the following reasons, the court finds that all of the Defendant's arguments are misplaced.

2. Reverse-Preemption and the McCarran-Ferguson Insurance Regulation Act

The Defendant asserts that the FAA is reverse-preempted by the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. §§1011-1015 (1999), so as to render the parties' Arbitration Agreement unenforceable.

The McCarran-Ferguson Act is designed to clear the way for state laws regulating the business of insurance, by displacing any federal law that conflicts with such state laws. But McCarran-Ferguson applies only in the narrow range of

cases involving state regulation of the insurance industry, [and] permits a state law to reverse preempt a federal statute only if: (i) the federal statute does not specifically relate to the "business of insurance;" (ii) the state law was enacted for the "purpose of regulating the business of insurance;" and (iii) the federal statute operates to "invalidate, impair, or supersede" the state law. *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998).

The Defendant's reverse preemption argument fails because the Defendant has failed to point to a single Mississippi state law that the FAA has purportedly invalidated, impaired, or superseded. Instead, the Defendant appears to argue that because Mississippi's Commissioner of Insurance is seemingly opposed to approving insurance policies that contain binding arbitration clauses, McCarran-Ferguson reverse preempts the FAA. The Fifth Circuit has made clear, however, that McCarran-Ferguson only permits state laws or statutes to reverse preempt federal statutes; informal policies of state officials may not do so. *Munich Am. Reinsurance Co.*, 141 F.3d at 590. As such, the Defendant's claim of reverse-preemption fails and the McCarran-Ferguson Insurance Regulation Act is inapplicable.

3. Compulsory Counterclaim

The Defendant asserts that the Plaintiffs' petition to compel arbitration is a compulsory counterclaim that, pursuant to Rule 13(a) of the Federal Rules of Civil Procedure, was required to be filed in the Defendant's

pending state lawsuit, if at all.[1] This assertion is belied by the express provisions of the FAA, and in particular by Section Four of the FAA, which provides that:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. §4 (1999). This section of the FAA plainly authorizes a party, against whom litigation has been brought, to commence a separate original action in federal district court to seek enforcement of an arbitration agreement. As such, the Defendant's Rule 13(a) objection to the Defendants' petition is without merit.

---

1. Rule 13(a) provides, in pertinent part, that:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Fed. R. Civ. P. 13(a).

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4. Demand For a Jury Trial

Finally, the Defendant contends that the demand for a jury trial renders an order compelling arbitration inappropriate at the present time.

While the FAA does allow for parties to demand a jury trial to resolve factual issues surrounding the making of the arbitration agreement or the failure, neglect or refusal to perform the agreement, it is well settled that "[a] party to an arbitration agreement cannot obtain a jury trial merely by demanding one." *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1154 (5th Cir. 1992) (holding, in addition, that Defendant "must make at least some showing that under prevailing law, he would be relieved of his contractual obligation to arbitrate if his [factual] allegations [surrounding the arbitration agreement] proved to be true."); 9 U.S.C. §4 (1999). In addition, the Defendant "must produce at least some evidence to substantiate his factual allegations." *Dillard*, 961 F.2d at 1154.

Here, the Defendant has proffered no evidence whatsoever supporting the conclusion that a jury trial is warranted in this action. As such, the court finds that a jury trial is not required, and an order compelling the Defendant to submit all claims to arbitration is appropriate without a jury trial.

In sum, the court finds that all of the Defendant's claims are covered by the arbitration provision contained in the Arbitration Agreement, and that all of the Defendant's claims are arbitrable. All of the Defendant's claims, therefore, shall be submitted to arbitration in accordance with the terms of the Arbitration Agreement.

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5. Stay of State Court Proceedings

In addition to seeking an order compelling the Defendant to submit all pending claims to arbitration, the Plaintiffs also seek to stay the Defendant's pending state court action.

The Anti-Injunction Act states that:

> A court of the United States may not . . . stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. §2283 (2000).

The court finds that in the particular circumstances of this case, a stay is required to protect or effectuate this court's judgment and order that the controversy between the parties be submitted to arbitration. The court further finds that the policies embodied in the FAA militate against having ongoing state proceedings at the very time those same claims are the subject of arbitration proceedings.

In sum, the court concludes that the principle of judicial economy, the strong judicial policy favoring arbitration expressed by the Supreme Court, the plain language of the Anti-Injunction Act, and the policies embodied in the FAA warrant a stay of the Clay County action.

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C. Conclusion

For the above stated reasons, the Plaintiffs' petition to compel arbitration is granted, the Defendant's claims are referred to arbitration, and the Defendant's pending state law claims are stayed.

A separate order in accordance with this opinion shall issue this day.

This the 28 day of June 2001.

s/ Glen H. Davidson
Chief Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 9, 2002

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 01-60678

AMERICAN HERITAGE LIFE INSURANCE COMPANY; FIRST COLONIAL INSURANCE COMPANY OF FLORIDA; FIDELITY NATIONAL CORPORATION, doing business as Republic Finance Inc.,

Plaintiffs - Appellees,

v.

JOHN D. ORR,

Defendant - Appellant.

Case No. 01-60679

AMERICAN HERITAGE LIFE INSURANCE COMPANY; FIRST COLONIAL INSURANCE COMPANY OF FLORIDA; FIDELITY NATIONAL CORPORATION, doing business as Republic Finance Inc.,

Plaintiffs - Appellees,

v.

BETTY E. SANFORD,

Defendant - Appellant.

Appendix C

Case No. 01-60680

AMERICAN HERITAGE LIFE INSURANCE COMPANY; FIRST COLONIAL INSURANCE COMPANY OF FLORIDA; FIDELITY NATIONAL CORPORATION, doing business as Republic Finance Inc.,

Plaintiffs - Appellees,

v.

FRANKIE L. MOORE,

Defendant - Appellant.

Case No. 01-60681

AMERICAN HERITAGE LIFE INSURANCE COMPANY; FIRST COLONIAL INSURANCE COMPANY OF FLORIDA; FIDELITY NATIONAL CORPORATION, doing business as Republic Finance Inc.,

Plaintiffs - Appellees,

v.

JIMMIE MARTIN,

Defendant - Appellant.

Appendix C

Case No. 01-60682

AMERICAN HERITAGE LIFE INSURANCE COMPANY; FIRST COLONIAL INSURANCE COMPANY OF FLORIDA; FIDELITY NATIONAL CORPORATION, doing business as Republic Finance Inc.,

Plaintiffs - Appellees,

v.

NATHANIEL HENLEY,

Defendant - Appellant.

Appeals from the United States District Court for the Northern District of Mississippi, Aberdeen

ON PETITION FOR REHEARING

Before WIENER and DENNIS, Circuit Judges, and LITTLE, District Judge.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

s/ Jacques L. Wiener, Jr.
JACQUES L. WIENER, JR.
UNITED STATES CIRCUIT JUDGE

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* Chief District Judge of the Western District of Louisiana, sitting by designation.

Supreme Court, U.S.
FILED
NOV 22 2002
OFFICE OF THE CLERK

No. 02-554

In The
Supreme Court of the United States

JOHN D. ORR, BETTY E. SANFORD, FRANKIE L. MOORE, JIMMIE MARTIN, and NATHANIEL HENLEY,

Petitioners,

v.

AMERICAN HERITAGE LIFE INSURANCE COMPANY, FIRST COLONIAL INSURANCE COMPANY OF FLORIDA, and FIDELITY NATIONAL CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Fidelity takes issue with some of the factual statements made by Petitioners in their Statement of the Case; therefore, Fidelity offers the following statement of the case:

Petitioners are customers of Fidelity who entered into loan transactions and purchased credit related insurance. As part of the consideration for making the loans, each of the Petitioners signed arbitration agreements. Specifically, the arbitration agreements, signed by each of the petitioners, clearly provide that:

> "any claim, dispute or controversy between undersigned . . . and lender (or the employees, agents or assigns of lender) arising from or relating to the loan or any prior extension of credit by lender to any of the undersigned insurance written in connection herewith . . . shall be resolved by binding arbitration."

Despite signing the arbitration agreements, Petitioners filed a civil action in Mississippi state court against Fidelity and three of its individual employees/former employees as well as against First Colonial Insurance Company of Florida and American Heritage Life Insurance Company (collectively, the "Insurers") asserting various causes of action arising from the loans and the sales of insurance.

On March 8, 2001, Fidelity, along with the Insurers, filed these actions seeking orders compelling arbitration and staying the state court action. It was undisputed that each of the Petitioners executed at least one mandatory and binding arbitration agreement in conjunction with the loan transactions. The arbitration agreements preclude

the resolution of Petitioners' claims outside the operation of the Federal Arbitration Act, 9 U.S.C. §1 (the "FAA"). Additionally, it was undisputed that Petitioners' claims against Fidelity and the Employees were predicated upon "the loan or any prior extension of credit" and upon "insurance written in connection" with the extension of credit and/or the loans.

On June 28, 2001, the district court issued opinions and orders compelling arbitration in each of the cases, requiring that Petitioners' claims be submitted to arbitration in accordance with the arbitration agreements, staying all proceedings in the state court suit, and closing the cases. Motions for reconsideration were filed which were denied.

Appeals were taken to the Fifth Circuit. The Fifth Circuit issued an opinion in which it affirmed the district court's orders compelling arbitration and staying the state court proceeding. A petition for rehearing was filed and was denied.

ARGUMENT

There are no compelling reasons that would justify granting a writ of certiorari in this matter. Contrary to the argument of Petitioners, the decision of the Fifth Circuit Court of Appeals is not in conflict with any decision of any other United States court of appeals on the same matter. In addition, the Fifth Circuit did not decide an important federal question in a way that conflicts with a decision by a state court of last resort. Also, in deciding this case, the Fifth Circuit did not depart from the accepted and usual course of judicial proceedings, or sanction such a departure

by the lower court, so as to call for an exercise of this Court's supervisory power. Finally, the Fifth Circuit did not decide an important question of federal law that has not been, but should be, settled by this Court, and the Fifth Circuit did not decide an important question in a way that conflicts with relevant decisions of this Court. See Rule 10 of the Supreme Court Rules. Therefore, none of the considerations under which this Court would consider granting a writ of certiorari exist in this matter.

The reasons argued in the Petitioners' writ application do not justify granting a writ in this matter. The Fifth Circuit was correct in affirming the orders compelling arbitration and staying the state court proceedings. Contrary to the arguments of the Petitioners, the Fifth Circuit did not err in concluding that the Petitioners voluntarily waived their right to a jury trial and that the arbitration agreements are not unenforceable due to alleged high costs of arbitration; the Fifth Circuit's decision does not impair the Mississippi Insurance Commissioner's statutory powers to regulate the business of insurance in Mississippi; the Fifth Circuit's decision is not a contradiction; and the Fifth Circuit's decision does not conflict with decisions of other circuits. This Court should deny this writ application.

I. THE FIFTH CIRCUIT CORRECTLY FOUND THAT THE PETITIONERS VOLUNTARILY WAIVED THEIR RIGHT TO A JURY TRIAL.

The Petitioners voluntarily and knowingly signed the arbitration agreements which contained the following language, which appeared immediately above the signature line:

THE PARTIES UNDERSTAND THAT BY SIGNING THIS ARBITRATION AGREEMENT, THEY ARE LIMITING ANY RIGHT TO PUNITIVE DAMAGES AND GIVING UP THE RIGHT TO A TRIAL IN COURT, BOTH WITH AND WITHOUT A JURY.

The arbitration agreements clearly and unmistakably provided for a waiver of any right to a jury trial. *See Smith v. EquiFirst Corporation*, 117 F. Supp. 2d 557, 560-62 and 564-66 (S.D. Miss. 2000.)

Petitioners contend that since the arbitration agreements effectively waive their right to a jury trial or a bench trial, waive their right to collect punitive damages, and effectively foreclose their right of access to the courts of Mississippi, the Fifth Circuit erred in affirming the orders compelling arbitration. The Petitioners cite to the Mississippi Constitution and several Mississippi cases in support of this argument. However, these do not support their argument. The Mississippi Supreme Court jurisprudence supports the Fifth Circuit's decision.

The strong public policy and presumption in favor of the enforcement of arbitration agreements by the federal courts has been adopted by the Mississippi Supreme Court. In *IP Timberlands Operating Co., Ltd. v. Denmiss Corp.*, 726 So. 2d 96, 104 (Miss. 1998), the Mississippi Supreme Court expressly overruled a line of decisions which had permitted the unilateral revocation of arbitration agreements and stated that it would henceforth "respect the right of an individual or entity to agree in advance of a dispute to arbitration or other alternative dispute resolution." Additionally, the court recognized that:

> "In enacting §2 of the Arbitration Act, *Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration*. Congress has thus mandated the enforcement of arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984)). The Arbitration Act, resting on Congress's authority under the Commerce Clause, creates a body of federal substantive law that is applicable in both state and federal courts. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

726 So. 2d at 107 (emphasis added).

The Mississippi Supreme Court also stated that: "Doubts as to the availability of arbitration must be resolved in favor of arbitration." 726 So. 2d at 107. Therefore, in accordance with the public policy of the State of Mississippi, "[a]rticles of agreement to arbitrate, and awards thereon are to be liberally construed so as to encourage the settlement of disputes and the prevention of litigation, and every reasonable presumption will be indulged in favor of the validity of arbitration proceedings". *Smith Barney, Inc. v. Henry*, 775 So. 2d 722, 724 (Miss. 2001).

Petitioners argue that, despite the *IP Timberlands* decision, the arbitration agreements should be set aside because they were entered into between parties of unequal bargaining power and unequal knowledge and because they involved boilerplate contracts of adhesion. This argument is not supported by the Mississippi jurisprudence. In *Russell v. Performance Toyota, Inc.*,

No. 2001-CA-00832-SCT (Miss. 9/19/02) 826 So. 2d 719, the Mississippi Supreme Court recently rejected an argument that the arbitration agreement was unilateral and inequitable because the plaintiff who had signed the agreement was a consumer and Performance Toyota was a corporation with a much greater bargaining position. The *Russell* court noted that there were numerous car dealerships in the area where the plaintiff purchased the car and that the defendant was not the sole supplier. It was also noted that after the plaintiff was presented with the purchase agreement, he was not coerced into signing it and could have walked away and could have gone to another dealership. *Id.* Therefore, the court upheld the arbitration agreement even though it was between a consumer and a commercial entity. *See also, Smith Barney, supra.*

The Mississippi Supreme Court in *Russell* has clearly rejected the notion that the *IP Timberlands* reasoning does not apply to a case involving a consumer and a commercial operation. Therefore, the Fifth Circuit did not err in holding that the Petitioners' arbitration agreements were valid and enforceable.

The Petitioners also argue that the Fifth Circuit erred in enforcing the arbitration agreements because they are unconscionable. They rely on the case of *East Ford, Inc. v. Taylor*, 2000-IA-01527-SCT (Miss. 7-18-2002) 826 So. 2d 709. That reliance is in error. Contrary to the Petitioners' claim, the arbitration agreement in the *East Ford* case was not similar to the one in this particular case. Indeed, the main factor on which the Mississippi Supreme Court relied on, in finding unconscionability in *East Ford,* was the fact that the arbitration agreement was not printed in boldface type and the typeface for the arbitration agreement was smaller than all of the other provisions of the

contract. To the contrary, the arbitration agreement in this case is in boldface print and is very clearly marked in the document. Also, the *East Ford* court found that the arbitration clause was clearly one-sided with the proponent of the agreement having the right to unilaterally rescind the entire agreement. The arbitration agreements in this case are not similar to the *East Ford* agreement. Rather, the Petitioners' arbitration agreements clearly provide that any claim, dispute, or controversy between the petitioner and respondent arising from or related to the loan or a prior extension of credit by respondent to the petitioner, etc. shall be resolved by binding arbitration. Therefore, both parties to the agreement agreed to arbitrate claims. The *East Ford* case is clearly distinguishable. *See also*, *Russell*, *supra,* n. 1.

In addition, the more recent Mississippi Supreme Court decision in *Russell*, *supra*, provides further support for the enforcement of the arbitration agreement in this case. In *Russell*, the plaintiff argued that the arbitration agreement was unilateral and unconscionable because he had a lack of knowledge of the contract as a whole and of the arbitration agreement in particular. The Mississippi Supreme Court noted that the arbitration agreement was preceded by boldface and capitalized headings and was almost immediately succeeded by the signature line. The court stated: "In Mississippi, a person is charged with knowing the contents of any document that he executes." 826 So. 2d at 726. Finally, with regard to the plaintiffs' claim that the arbitration clause unnecessarily shielded the defendant from its own potential negligence, the *Russell* court found that the arbitration clause pertained to claims of either party and did not benefit the defendant

only. *Id.* Thus the court rejected the unconscionability claim.

The recent jurisprudence of the Mississippi Supreme Court is not in conflict with the Fifth Circuit decision with regard to enforcement of the arbitration agreements. Rather, the cases support the decision reached by the Fifth Circuit.

II. THE FIFTH CIRCUIT CORRECTLY HELD THAT THE ARBITRATION AGREEMENTS ARE NOT UNENFORCEABLE DUE TO ALLEGED HIGH COSTS OF ARBITRATION.

Petitioners argue that the Fifth Circuit erred in rejecting their claim that the agreements are unenforceable because the Petitioners would have to pay significant costs in order to arbitrate their claims to conclusion. Petitioners failed to meet their burden of proving the likelihood of incurring prohibitively expensive costs. *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 92, 121 S. Ct. 513, 522, 148 L. Ed. 2d 373 (2000). The Fifth Circuit did not err in finding that the Petitioners did not satisfy that burden.

First, the provision in the American Arbitration Association ("AAA") administrative fee schedule states that *"[u]nless the parties agree otherwise,* arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award." (Emphasis added). In this case, the arbitration agreements provide that "the party requesting arbitration shall at that time pay the arbitrator $125.00. Lender shall pay arbitrator all other arbitration fees and expense costs for up to one day

(eight hours) of proceedings. Any other such costs shall be paid by the nonprevailing party. . . . "

Based on that language, since the filing fee and case service fee are necessary "for up to one day (eight hours) of proceedings," the filing fee and case service fee are payable by Fidelity, and any others claiming the benefit of the arbitration agreements through Fidelity, and are clearly not payable by the Petitioners. If, and to the extent the arbitration hearing may go beyond one day, Fidelity has represented that it will pay all of the costs and expenses of arbitration, if the Petitioners prevail. Therefore, the Fifth Circuit correctly found that the record does not support the conclusion that it is likely that the Petitioners will have to pay prohibitively expensive costs in order to arbitrate their claims.

Finally, Rule R-51 of the Commercial Arbitration Rules of the AAA provides, in part, that "[t]he AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees." To date, Petitioners have not inquired or sought clarification about this issue and they have not sought any deferral or reduction of the administrative fees, if any, that might be payable by the Petitioners with respect to their claims against Respondent. Having *not* done so, the Petitioners have not and can not prove, that it is probable that the petitioners will have to pay prohibitively expensive costs in order to arbitrate their claim to conclusion. *See Dobbins v. Hawks' Enterprises,* 198 F. 3d 715 (8th Cir. 1999) (holding that plaintiff's failure to explore the AAA fee waiver provisions prevented the trial court from ruling on the plaintiff's contention that the arbitration clause was unconscionable because of fees).

The cases cited by Petitioners in support of their argument regarding the costs of arbitration, *Shankle v. B-G Maintenance Management of Colorado, Inc.,* 163 F. 3d 1230, 1234-35 (10th Cir. 1999) and *Cole v. Burns International Security Services,* 105 F. 3d 1465, 1483-89 (D. C. Cir. 1997), do not support their position. In *Shankle,* the appellate court followed *Cole.* In *Cole,* the court based its decision with regard to the fees and costs of arbitration upon its finding or conclusion that the arbitration agreement did not expressly address who would pay the arbitrator's fees and that there was no indication in the rules of the AAA that an arbitrator's fees could be reduced or waived in cases of hardship. *Id.*

As the Fifth Circuit noted, the present scenario is distinguishable from *Cole* and *Shankle*, because the arbitration agreements signed by the Petitioners provide that "[t]he party requesting arbitration [Fidelity] shall at that time pay the arbitrator $125.00. Lender [Fidelity] shall pay all other arbitration fees and expenses and costs for up to one day (eight hours) of proceedings. Any other such costs shall be paid by the non-prevailing party." Furthermore, as pointed out above and as the Fifth Circuit found, the rules of the AAA provide "sufficient avenues to request fee-paying relief, if necessary". Thus, the *Cole* and *Shankle* decisions are distinguishable in relation to this action to compel arbitration of the Petitioners' claims against Fidelity.

Indeed, other jurisprudence supports the Fifth Circuit's decision. In *Arakawa v. Japan Network Group,* 56 F. Supp. 2d 349 (S.D. N.Y. 1999), the court declined to follow *Shankle* and *Cole,* and determined that the possibility that a plaintiff might be required to pay a portion of arbitration costs did not preclude the arbitration of her

Title VII claims. *Id* at 355. The court held that the possibility that a plaintiff may be required to pay arbitration fees is not, by itself, a sufficient reason to invalidate an agreement to arbitrate Title VII claims at the outset because the arbitral panel may not, in fact, require the plaintiff to pay fees, and, if a plaintiff believes that excessive fees have been levied against him or her, judicial review of the imposition of the fees is available after arbitration. *Id.*

In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F. 3d 1 (1st Cir. 1999), the court recognized the availability of judicial relief should the costs be excessive. In *Rosenberg*, an employee argued that the arbitration agreement was unconscionable because the employee could be charged forum fees, which might be as high as $3,000 per day and tens of thousands of dollars per case. *Id* at 15. The court responded that if unreasonable fees were to be imposed on an employee, the employee could present the issue to the reviewing court. *Id* at 16. The court noted that "[c]ontrary to Rosenberg's arguments, arbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim in court." *Id.*

Additionally, in *Sydnor v. Conseco Financial Servicing Corp.*, 252 F. 3d 302 (4th Cir. 2001), the Court held that the financing contract's arbitration provision was not unconscionable due to unknown fees, costs and procedures and that the plaintiff had presented little evidence from which the District Court could have concluded that arbitration was prohibitively expensive and, furthermore, the financing company had represented to the Court its willingness to pay the arbitration fees arising from the dispute. *Id* at 306.

Petitioners' contention regarding costs is simply without merit. The cost of the arbitration proceedings is not a basis to preclude enforcement of the agreements and this argument does not warrant the granting of writs of certiorari in this matter.

III. THE FIFTH CIRCUIT CORRECTLY FOUND THAT THE AMERICAN ARBITRATION ACT IS NOT REVERSE PRE-EMPTED BY ANY STATE STATUTE.

The Petitioners have argued that the writ should be granted because the Fifth Circuit's decision effectively eviscerates the Mississippi Insurance Commissioner's statutory given power to regulate the business of insurance in Mississippi. Relying on the McCarran-Ferguson Act, 15 U.S.C.A. §1012, the Petitioners argue that the FAA is precluded or preempted by state law.

The McCarran-Ferguson Act does not affect the enforceability of the arbitration agreements with regard to the Petitioners' claims against Fidelity. It is assumed that Petitioners intend for this argument to apply only to the claims against the Insurers and not to the claims against Fidelity. However, out of an abundance of caution, Fidelity will briefly address the issue.

As the Fifth Circuit found, the Petitioners failed to demonstrate that there is a Mississippi statute regulating the business of insurance which prohibits arbitration or arbitration agreements with respect to credit insurance and claims, disputes, and controversies related to credit insurance. The McCarran-Ferguson Act is operative, if at all, only in the context of a state statute. *See Miller v. National Fidelity Life Insurance Company,* 588 F. 2d 185

(5th Cir. 1979). The Tenth and the Second Circuits have held that the McCarran-Ferguson Act does not bar application of the FAA to insurance contracts. *Hart v. Orion Ins. Co.*, 453 F. 2d 1358, 1360 (10th Cir. 1971); *Hamilton Life Ins. Co. of N. Y. v. Republic Nat. Life Ins. Co.*, 408 F. 2d 606, 611 (2d Cir. 1969). The basis of their decisions, like that of the district court and the Fifth Circuit in this matter, was that the party seeking to avail itself of McCarran-Ferguson Act failed to show that application of the FAA would invalidate, impair, or supersede any particular state law which regulated the business of insurance.

Petitioners argue that they have put forward Title 83 of the Mississippi Code of 1972 and in particular, §83-53-15, as evidence of the applicability of the McCarran-Ferguson Act. However, a close reading of these statutes and in particular §83-53-15, does not reveal any specific authority for the Commissioner to prohibit arbitration agreements such as the ones at issue in this case from being enforceable. Furthermore, it should be noted that the arbitration agreements at issue here are not found in any policy of insurance. Rather, they are separate documents that were executed by the Petitioners in conjunction with their execution of several other documents related to loans that they obtained from Fidelity. Indeed, the arbitration agreements do not specifically refer to the Insurers and the Insurers did not execute the arbitration agreements. The Insurers are simply third party beneficiaries of the arbitration agreements.

Additionally, there is no statutory or other requirement that the arbitration agreements between the lender Fidelity and the Petitioners be filed with and approved by the Commissioner or the Department of Insurance. While

there are certain statutes which require insurance companies to file and obtain the Commissioner's approval of application, policy, certificate, endorsement and rider forms, the arbitration agreements were not prepared by, nor obtained by, any insurance company, and no insurance company is a named party to the subject arbitration agreements. The arbitration agreements also are not forms, endorsements or riders of or to any policies or certificates of insurance. The arbitration agreements were prepared by Fidelity, a lender of money, and they were entered into by the parties as a part of, and in regard to, transactions in which Fidelity loaned money to the Petitioners, which transactions included credit insurance in connection with the loans. As stated in the arbitration agreements, they were entered into "in consideration of" Fidelity making a loan or otherwise extending credit to the Petitioners.

There is no reverse preemption in this case. Therefore, this is no basis for granting a writ in this matter.

IV. THE FIFTH CIRCUIT'S OPINION IS NOT A CONTRADICTION.

The Petitioner's argument regarding an alleged contradiction in the Fifth Circuit opinion is irrelevant to this Court's decision of whether this petition for a writ should be granted. They argue that, in one place in the opinion, the Fifth Circuit held that because there was no Mississippi statute that addresses arbitration of credit insurance related claims, disputes or controversies, the Mississippi Commissioner of Insurance is without regulatory authority to prohibit arbitration clauses relating to insurance. They also claim that despite that holding, in

another place in the opinion, in a footnote, the Fifth Circuit stated that "the record indicates that the Commissioner can permit or disallow insurance disputes to be subject to arbitration as the Commissioner deems fit."

Those two statements must be analyzed in the context in which they were used. First, the issue before the Fifth Circuit was whether the McCarran-Ferguson Act had been violated by the district court's order compelling arbitration. More particularly, the issue was whether the McCarran-Ferguson Act barred application of the FAA to the arbitration agreements at issue. The Fifth Circuit correctly stated that in order for the McCarran-Ferguson Act to reverse preempt the FAA, there must be a demonstration that application of the FAA would invalidate, impair, or supersede a particular state law that regulates the business of insurance. Finding that the Petitioners had failed to identify any state statute that would be impaired, invalidated, or superseded by the application of the FAA, the Fifth Circuit affirmed the lower court.

The statement made by the Fifth Circuit in the footnote, with regard to the record indicating that the Mississippi Commissioner of Insurance had the ability to permit or disallow insurance disputes to be subject to arbitration as the Commissioner deems fit, has no relation to the issue of whether, under the McCarran-Ferguson Act, a state law reverse preempts the application of the FAA to the arbitration agreements. That issue depends on the existence or non-existence of a **state statute** granting the Mississippi Commissioner of Insurance the authority to disallow the use of arbitration agreements with regard to the sale of credit related insurance. That issue does not depend on whether the evidence reveals that the Mississippi Commissioner of Insurance has either allowed or

disallowed the use of any such agreements. Absent a state statute authorizing that power, there is no state statute that can preempt the FAA under the McCarran-Ferguson Act. Therefore, this is a non-issue and is no basis for granting a writ.

V. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

Petitioners cite three cases which they contend are in conflict with the Fifth Circuit's decision. None of these cases is in conflict with the Fifth Circuit decision.

The first case cited by Petitioners is *Doe v. Norwest Bank Minnesota, N.A.*, 107 F. 3d 1297 (8th Cir. 1997). That case is distinguishable from the present case. In *Doe*, the court addressed the issue of whether the McCarran-Ferguson Act was implicated by the federal RICO statute when it substantially paralleled state law. Although the remedies under RICO were different than the remedies available under the state law, the court held that "the extraordinary remedies of RICO would frustrate, and perhaps supplant, Minnesota's carefully developed scheme of regulation." *Id* at 1308. In this particular case, there is no parallel state statute that addresses arbitration agreements. Therefore, the *Doe* case is not in conflict with the Fifth Circuit's decision.

Next, contrary to the Petitioners' contention, the court in *Grimes v. Crown Life Ins. Co.*, 857 F. 2d 699 (10th Cir. 1988), *cert. denied*, 489 U.S. 1096, 109 S.Ct. 1568, 103 L. Ed. 2d 934 (1989) did not address the issue of whether a state statute preempted the FAA under the McCarran-Ferguson Act. Rather, the issue in *Grimes* was whether

the federal court should abstain from exercising jurisdiction over a case involving a state insurance receivership. The court referred to the McCarran-Ferguson Act as support for the proposition that the act encourages the states to formulate their own systems to regulate insurers doing business in their states. The court recognized that:

> [G]iven the traditional federal deference provided to state receivership proceedings ... coupled with complex and comprehensive procedures adopted for the liquidation of insolvent insurers pursuant to the provisions of the McCarran-Ferguson Act, most federal courts have declined to exercise jurisdiction in disputes like this one which present themselves in the larger context of state liquidation proceedings.

Id. at 703-704. The court held that since Oklahoma had not only adopted the comprehensive scheme to oversee the liquidation of insolvent insurers but had also provided a particular court to oversee the liquidation proceedings, the federal court should have abstained.

The issue in the present case is not an abstention issue. Rather, the issue is whether there is a state law regulating the business of insurance which prohibits arbitration agreements such as the ones in this matter that would be invalidated, impaired or superseded by the FAA. The facts in *Grimes*, the relevant law, and the holding have nothing in common with the present case other than the fact that the McCarran-Ferguson Act is mentioned in both cases. There is nothing in the Fifth Circuit opinion that is in conflict with the *Grimes* decision.

The district court decision in *Schwartz v. Com. Land Title Ins. Co.*, 374 F.Supp. 564 (E.D. Pa. 1974) order supplemented, 384 F.Supp. 302 is likewise distinguishable.

Schwartz addressed the issue of whether a seller charge for title insurance that was imposed on all real estate transactions fell within the exemption from the federal antitrust laws found in the McCarran-Ferguson Act. Under that section of the act, there is a specific provision which states that the Sherman Act, the Clayton Act, and the FTC Act shall be applicable to the business of insurance to the extent that such business is not regulated by state law. The present case does not involve an antitrust claim. Therefore, to the extent the district court decision in *Schwartz* may conflict with the Fifth Circuit decision, it is distinguishable on that basis. In addition, the *Schwartz* court found that the statutory scheme for title insurance regulation was comprehensive and conferred plenary regulatory power on the state Insurance Department including the power to regulate the seller charge. In this case, the petitioners have failed to point to any state statute that would indicate that the Insurance Commissioner had the power to disallow arbitration agreements related to credit life insurance transactions. Therefore, the *Schwartz* case is distinguishable on that basis also.

Each of the decisions cited by Petitioners is distinguishable from the Fifth Circuit decision. Therefore, there is no conflict among the circuits that would warrant the granting of this writ application.

CONCLUSION

There are no compelling reasons that would justify granting a writ of certiorari in this matter. None of the reasons listed in Supreme Court Rule 10 exists in this matter. First, the decision of the Fifth Circuit Court of

Appeals is not in conflict with any decision of any other United States court of appeals on the same matter. Second, the Fifth Circuit did not decide an important federal question in a way that conflicts with a decision by a state court of last resort. Third, in deciding this case, the Fifth Circuit did not depart from the accepted and usual course of judicial proceedings, or sanction such a departure by the lower court, so as to call for an exercise of this Court's supervisory power. Finally, the Fifth Circuit did not decide an important question of federal law that has not been, but should be, settled by this Court, and the Fifth Circuit did not decide an important question in a way that conflicts with relevant decisions of this Court.

In addition, none of the arguments raised by Petitioners would justify the granting of a writ of certiorari in this matter. The Fifth Circuit correctly held that the Petitioners' claims against Fidelity are subject to the arbitration agreements at issue. The Fifth Circuit was correct in affirming the orders compelling arbitration and staying the state court proceedings. Contrary to the arguments of the Petitioners, the Fifth Circuit did not err in concluding that the Petitioners voluntarily waived their right to a jury trial and in concluding that the arbitration agreements are not unenforceable due to alleged high costs of arbitration. The Fifth Circuit's decision also does not impair the Mississippi Insurance Commissioner's statutory powers to regulate the business of insurance in Mississippi. Finally, the Fifth Circuit's decision is not a contradiction and is not in conflict with other circuits. The arbitration agreements, which were executed by the Petitioners in consideration for extensions of loans, explicitly preclude the resolution of the Petitioners' claims outside the operation of the FAA, and the promulgated

commercial arbitration rules of the AAA. This Court should deny this writ application.

Respectfully submitted,

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No. 02-554

NOV 25 2002

In The
Supreme Court of the United States

JOHN D. ORR, BETTY E. SANFORD, FRANKIE L. MOORE, JIMMIE MARTIN, and NATHANIEL HENLEY,

Petitioners,

v.

AMERICAN HERITAGE LIFE INSURANCE COMPANY, FIRST COLONIAL INSURANCE COMPANY OF FLORIDA, and FIDELITY NATIONAL CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether an opinion of the Mississippi Commissioner of Insurance expressed in an affidavit obtained for litigation is sufficient to invoke reverse-preemption under the McCarran-Ferguson Act, 15 U.S.C. § 1011, and bar application of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et. seq.*, in the absence of any state law or statute prohibiting the arbitration of insurance-related disputes.

2. Whether signatories to an arbitration agreement knowingly waived the right to a jury trial, when they, among other things, signed an arbitration agreement directly above bold, capital, readily legible letters, which states in part that the signatory is "GIVING UP THE RIGHT TO A TRIAL IN COURT, BOTH WITH AND WITHOUT A JURY."

3. Whether Petitioners put the "making" of the arbitration agreement at issue when every defense Petitioners raise relates to the contracts as a whole.

4. Whether an arbitration agreement is unenforceable due to allegations regarding the potential cost of arbitration when the arbitration agreement: (1) incorporates the American Arbitration Association ("AAA") rules allowing the arbitrator to defer or reduce fees in the event of extreme hardship on the part of any party; (2) expressly provides that the lender will pay all arbitration fees and expenses for up to one day of the proceedings, excluding the initial $125 fee; (3) expressly provides that any other costs shall be paid by the non-prevailing party; and Petitioners have submitted no evidence that their ability to arbitrate will be impeded by the alleged costs of arbitration.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

Respondents American Heritage Life Insurance Company and First Colonial Insurance Company are wholly owned by the Allstate Corporation.

The Allstate Insurance Company is publicly traded on the NYSE.

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BRIEF IN OPPOSITION FOR RESPONDENTS

Respondents American Heritage Life Insurance Company and First Colonial Life Insurance Company (collectively "American Heritage") submit that the Petition for Writ of Certiorari ("Pet.") filed by Petitioners is due to be denied.

STATEMENT OF THE CASE

American Heritage respectfully advises this Court that the Petition distorts and mischaracterizes the facts of this case. In addition to the misstatements identified in the body of this opposition, Petitioners ignore the legal significance of the following undisputed facts:

- Each Petitioner obtained a loan or loans from Fidelity National Corporation ("Fidelity").
- Each loan included an arbitration agreement. That is, the arbitration agreements at issue were contained in loan documents, not in insurance contracts.
- Each arbitration agreement was presented on its own page with the title "**ARBITRATION AGREEMENT**" in bold, capital letters.
- Each Petitioner executed an arbitration agreement. Some Petitioners executed multiple arbitration agreements.
- Each arbitration agreement expressly stated that all claims arising from the loan or credit insurance purchased with the loan would be resolved through arbitration.

- Each Petitioner purchased credit insurance from American Heritage.
- Each Petitioner alleged civil conspiracy between American Heritage and Fidelity.

It is undisputed that Petitioners executed valid, enforceable arbitration agreements when obtaining multiple loans and purchasing credit insurance. These agreements explicitly refer any claim related to the solicitation and sale of credit insurance to arbitration. Despite having agreed to arbitrate their claims, Petitioners filed suit in the Circuit Court of Clay County, Mississippi seeking over $35 million in damages. In response, American Heritage and Fidelity were forced to file independent actions in federal court to enforce the arbitration agreements executed by Petitioners.

American Heritage takes particular issue with certain mischaracterizations made by Petitioners. First, Petitioners improperly refer to the arbitration agreements as "adhesion-type contracts." (Pet. at 2). Petitioners cannot support this blatant mischaracterization because the arbitration agreements expressly state that they are in consideration of Fidelity's extension of credit or loans to Petitioners. Additionally, the Fifth Circuit noted that the arbitration agreements at issue were in clear language and legible print. *American Heritage Life Ins. Co. v. Orr,* 294 F.3d 702, 705-706 (5th Cir. 2002). The court also noted that the agreements were not hidden and "directly above the date and signature lines, in bold, capital, readily legible letters, is the following language":

> **THE PARTIES UNDERSTAND THAT BY SIGNING THIS ARBITRATION AGREEMENT, THEY ARE LIMITING ANY RIGHT**

TO PUNITIVE DAMAGES AND GIVING UP THE RIGHT TO A TRIAL IN COURT, BOTH WITH AND WITHOUT A JURY.

Id. (emphasis in original). Second, the credit insurance sold to Petitioners has never been characterized as "unnecessary," nor have the premiums ever been proven to be "exorbitant" or "in excess of market rates." (Pet. at 3).

Finally, one of the most egregious mischaraterizations made by Petitioners is their assertion that the arbitration provision waives Petitioners' right to "collect punitive damages from the respondents." (Pet. at 11). This assertion is directly contradicted by the express terms of the arbitration agreement, which states:

> If applicable law permits the award of punitive damages and the arbitrator authorizes such an award, the parties agree that such award to any party shall not exceed $20,000 or five times the amount of compensatory damages awarded.

An accurate statement of the facts and evidence on record are given in the Fifth Circuit and district court opinions, which American Heritage incorporates by reference. *See Orr*, 294 F.3d 705; *Harmon v. American Heritage Life Ins. Co.*, 01-80 (N.D. Miss. June 28, 2001) (Reprinted in Pet. Appendix B ("Pet. App.") at 29a).

REASONS FOR DENYING THE WRIT

I. Petitioners Raise Narrow, State Law Issues That Lack Broad Impact or Application

Petitioners ask this Court to decide matters that pertain almost solely to state law. These matters have

limited or no application outside the state of Mississippi and do not warrant Supreme Court review. A review of the Petition demonstrates that the main issue presented for review is whether an opinion of the Mississippi Commissioner of Insurance ("Commissioner"), expressed in an affidavit obtained for litigation, is sufficient to invoke reverse-preemption under the McCarran-Ferguson Act.

Throughout this case, Petitioners attempted to defeat arbitration by focusing on their theory that insurers cannot avail themselves of arbitration agreements because according to Petitioners, it is unlawful to arbitrate insurance matters in Mississippi. This allegation is not supported by any Mississippi statute, case, or law. Petitioners argue that the Mississippi Department of Insurance and the Mississippi Insurance Commissioner had not, and would not, approve arbitration agreements in insurance policies. Petitioners base this argument on a single affidavit by the Commissioner stating that he does not approve arbitration agreements in insurance contracts.[1] Thus, according to Petitioners, American Heritage, an insurance company, cannot enforce arbitration. Petitioners' contention lacks basis not only in statute and precedent, but also in reason.

Petitioners' argument ignores the fact that the arbitration agreements at issue are located in various loan agreements between Fidelity and Petitioners, not in

[1] Petitioners fail to note, however, that this affidavit was obtained from the Commissioner in anticipation of litigation. Petitioners also ignore the fact that the Commissioner subsequently permitted arbitration agreements in insurance contracts, in direct contradiction of the affidavit Petitioners submitted in this action.

insurance contracts. Petitioners erroneously insinuate that American Heritage furtively associated itself with the arbitration agreements at issue. Petitioners seize upon the irrelevant fact that in accord with Mississippi insurance law, First Colonial filed an insurance proposal that contained an arbitration agreement with the Department of Insurance. The Department of Insurance informed First Colonial that approval of the insurance proposal required that any arbitration agreement be mutually agreed upon and non-binding. Petitioners allege that because the Department of Insurance did not approve this insurance proposal, American Heritage found other avenues to arbitration. According to Petitioners, the action by American Heritage to compel arbitration through the third-party agreement is an attempt "to do something the Mississippi Insurance Commissioner would not allow." (Pet. at 7). Not only have both lower courts rejected this theory, these allegations are irrelevant to this dispute.

Petitioners' theory focuses on these irrelevant facts in an attempt to avoid the truth – Petitioners willingly and knowingly executed arbitration agreements with Fidelity that provided for arbitration of any and all claims relating to the loan or credit insurance purchased in connection with the loan. American Heritage has every right to compel arbitration through this third-party agreement because Petitioners allege substantially interdependent and concerted misconduct by both American Heritage and Fidelity. In particular, Petitioners allege that the Respondents colluded and conspired to sell insurance. (Pet. App. at 32a). Accordingly, both lower courts held that *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000), *cert. denied,* 531 U.S. 1013 (2000), entitles American Heritage to compel arbitration of Petitioners' claims

against them because the claims are intertwined with the claims against Republic Finance. *Orr*, 294 F.3d at 706; *see also* (Pet. App. at 32a).

Petitioners cannot avoid the obvious. Petitioners have not, and cannot, cite a single Mississippi law that prevents insurance companies from enforcing arbitration agreements in loan documents, let alone a Mississippi statute that prevents arbitration of insurance-related disputes. Thus, Petitioners have not met the high standard necessary to invoke reverse-preemption under the McCarran-Ferguson Act.

A. The McCarran-Ferguson Act Does Not Apply To This Case

Petitioners argue that the FAA is inapplicable to the arbitration agreements because the McCarran-Ferguson Act reverse-preempts the FAA. Petitioners present no support for this argument. The McCarran-Ferguson Act reverse-preempts the FAA "only in the context of a state statute evincing the same, not mere policy statements of state officials or administrative rule interpretations of governmental entities." *Orr*, 294 F.3d at 708 (citing *Miller v. Nat'l Fidelity Life Ins. Co.*, 588 F.2d 185, 196-197 (5th Cir. 1979)). Petitioners have not and cannot identify a single statute that prohibits arbitration of insurance-related matters. Therefore, Mississippi law is not impaired, invalidated or superseded by compelling arbitration pursuant to the FAA. As the Fifth Circuit found, because Petitioners lack the necessary foundation – a specific state statute – upon which to predicate their McCarran-Ferguson argument, Petitioners "try to perpetrate a judicial end-run by asserting that an attorney

general's opinion or insurance department's regulatory, administrative policy is the functional equivalent of a state law relating to insurance, thereby triggering the provisions of the Act." *Id.*

To this end, Petitioners erroneously contend that Mississippi law precludes arbitration of insurance matters, because:

1. Mississippi law grants the Mississippi Insurance Commissioner power to regulate the insurance business in Mississippi;

2. An affidavit obtained by Petitioners for litigation purposes from the Commissioner states that the Commissioner does not allow arbitration provisions in insurance agreements;

3. Correspondence between First Colonial and the Department of Insurance rejected an arbitration agreement proposed by First Colonial; and,

4. Mississippi law deems it unlawful to use policies rejected by the Commissioner.

Even assuming *arguendo* that these facts are true, clearly, these four items are insufficient to invoke reverse-preemption under the McCarran-Ferguson Act. Petitioners' reliance on these facts demonstrates that Petitioners do not, cannot, and have not identified a single Mississippi law that "addresses, much less prohibits or restricts arbitration of credit-related claims." *Orr*, 294 F.3d at 709. Therefore, neither these facts nor Petitioners' argument as a whole, trigger reverse preemption under the McCarran-Ferguson Act.

Petitioners proffer Title 83 of the Mississippi Code, in its entirety, in an effort to satisfy the well-settled standard necessary to invoke reverse-preemption. Miss. Code. Ann. § 83, *et. seq.* (1972), *see also* (Pet. at 6). Petitioners' argument is wholly without merit. Neither American Heritage nor the lower courts have ever disputed that Mississippi has set out to regulate insurance in Title 83. Both American Heritage and the lower courts have, instead, noted that nothing in Title 83 indicates, let alone states, that Mississippi prohibits arbitration of insurance-related matters. Consequently, despite their contention, Petitioners present no evidence of any state law that would be "eviscerated" by application of the FAA. In fact, Petitioners admit that the McCarran-Ferguson Act does not reverse-preempt when the statutory provision relied upon is "mere pretense." (Pet. at 11) (citing *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564 (E.D. Pa. 1974)). As the Fifth Circuit found, Petitioners' attempted reliance on the entire Mississippi Insurance Code and the Commissioner's purported opinion is subterfuge – an attempt to mask the simple fact that no Mississippi statute prohibits arbitration of insurance-related matters. *Orr*, 294 F.3d at 708.

Moreover, Petitioners' entire McCarran-Ferguson argument is based on a factual mischaracterization. The Commissioner's affidavit relates to arbitration within insurance contracts, whereas the arbitration agreements in this case are in various loan agreements. This distinction illustrates that the Commissioner's affidavit, at most, expresses only an opinion that insurance contracts cannot

contain arbitration agreements.[2] More importantly, the Commissioner's affidavit does nothing to prove that it is unlawful for an insurer to enforce an arbitration agreement contained in another party's contract.[3] This is particularly obvious because the Commissioner subsequently allowed insurance policies to include arbitration agreements. Based on this allowance, Petitioners' theory that insurers cannot compel arbitration through third-party contracts lacks any legal or rationale support. As previously stated, American Heritage was not a party to the arbitration agreement at issue. Instead, American Heritage's association with the contract derives from Petitioners' claims of substantially interdependent and concerted misconduct between American Heritage and Fidelity. Accordingly, Mississippi insurance law is in no way implicated and any discussion of Mississippi insurance law related to this arbitration agreement is misplaced.

Consequently, review of this dispute must focus solely on whether any Mississippi law prohibits arbitration of insurance-related claims. Both lower courts conducted thorough reviews of Mississippi law and held that no such law exists. Further review of Mississippi law would in no way provide extensive application for disputes throughout the country. Therefore, American Heritage respectfully

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[2] The Commissioner later changed this opinion when he approved an insurance contract containing an arbitration agreement, submitted by Primerica Life Insurance Company. *See Orr*, 294 F.3d at 709.

[3] Even a cursory review of the countless, recent Mississippi federal court decisions permitting insurers to enforce arbitration agreements contained in loan agreements attests to the error of Petitioners' contention.

submits that this case does not raise issues appropriate for Supreme Court review.

II. Petitioners Raise Settled Issues

A. Petitioners Waived Their Right To A Jury Trial

The issue of whether signatories to an arbitration agreement have the right to demand and receive a jury trial, despite having waived such rights under an arbitration agreement, has been considered and settled by courts across the country. The Fifth Circuit considered and applied these laws. Petitioners raise no new considerations regarding the right to a jury trial in their Petition. Petitioners merely seek an alternate ruling under laws previously applied, in an attempt to evade arbitration.

In seeking further review of this issue, Petitioners struggle to minimize their decision to waive their right to a jury trial. In asserting the right to a jury trial, Petitioners ignore the undisputed fact that every Petitioner chose to execute arbitration agreements and accepted "clear and unmistakable, capitalized and boldfaced words which expressly waived their right to a jury trial." *Orr*, 294 F.3d at 711. Petitioners cite *East Ford v. Taylor,* No. 00-01527SCT, 2002 WL 1584301 (Miss. July 18, 2002), in an attempt to support the assertion that they are "entitled to a jury trial on the making of the arbitration agreements." (Pet. at 13). In fact, the *East Ford* decision actually advocates against Petitioners' assertion that they are entitled to a jury trial based on the indisputable distinctions between the *East Ford* arbitration agreement and the arbitration agreements at issue in this case.

First, the format of the agreement in *East Ford* is distinguishable from the format used in the arbitration agreements Petitioners executed. The *East Ford* arbitration agreement:

> is not in boldface and it appears less than one third the size of many other terms in the document. . . . the arbitration clause along with the additional terms and status and compensation clause are all in very fine print and regular type font. . . . The arbitration clause also does not have any underlining nor any other effect which would alert the reader of the importance of its terms.

East Ford, 2002 WL 1584301, at *4. In contrast, the arbitration agreements signed by Fidelity and Petitioners were in clear language and legible print. *Orr*, 294 F.3d at 705-706. "Directly above the date and signature lines, in bold, capital, readily legible letters" the arbitration agreements alerted Petitioners that they were "**GIVING UP THE RIGHT TO A TRIAL IN COURT, BOTH WITH AND WITHOUT A JURY.**" *Id.* at 705 (emphasis in original).

Second, the terms of the arbitration agreement used in *East Ford* are distinguishable from the terms of the agreements Petitioners executed. In the *East Ford* arbitration agreement:

> The administrators of the agreement do not have any authority to award punitive damages. The arbitration clause also states that the only claims which may arise among the parties which are not subject to this arbitration agreement are claims by East Ford, Inc. . . .

East Ford, 2002 WL 1584301, at *5. Again, the arbitration agreements in this case are significantly distinguishable. The agreements at issue authorize the arbitrator to award punitive damages. Additionally, the agreements do not allow either party to unilaterally rescind the agreement, but require all parties to arbitrate all claims. Further, any exceptions contained in the agreement, such as allowing bankruptcy, repossession, replevin, foreclosure, and collection suits, mutually apply to all parties.

The Mississippi Supreme Court relied heavily on the questionable format and terms of the *East Ford* arbitration agreement in holding the agreement procedurally unconscionable. In contrast, the arbitration agreements in this case include all of the elements the court found lacking in the *East Ford* agreement. The distinctions between the *East Ford* arbitration agreement and the agreements executed in this case illustrate that the agreements Petitioners executed are not unconscionable.

Further, having signed arbitration agreements, Petitioners are entitled to a jury trial only if they specifically attack the making of the arbitration agreements. *Orr,* 294 F.3d at 711 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967)); *See also Russell v. Performance Toyota,* 01-00832SCT, 2002 WL 31087644 (Miss. Sept. 9, 2002) (holding that procedural unconscionability attack on a contract containing an arbitration agreement is an attack on the formation of the contract generally). "It is well-established that '[a] party to an arbitration agreement cannot obtain a jury trial merely by demanding one.'" *Orr,* 294 F.3d at 711 (quoting *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 961 F.2d 1148, 1154 (5th Cir. 1992). Petitioners argue that the affidavits attack the "making" of the arbitration agreements. The

Fifth Circuit considered the affidavits, however, and ruled that Petitioners did not satisfy their burden of proving fraud in the making of the arbitration agreement. *Orr,* 294 F.3d at 710.

Specifically, the Fifth Circuit held that affidavits "proffered by [Petitioners] . . . amount to bald assertions that do not approach fraud in the 'making' of the agreements." *Id.* (citing *Bhatia v. Johnston,* 818 F.2d 418, 421-422 (5th Cir. 1987)). The Fifth Circuit also held that other than their "self-serving affidavits," Petitioners had not "submitted a whisper of evidence to support the conclusion that a jury trial is warranted." *Id.* Based on the Fifth Circuit's full review of the Petitioners' jury trial arguments, any issue regarding Petitioners' demand for a jury trial would simply be a review and application of well-settled precedent and would produce no new ruling.

B. The Cost Of Arbitration Is Not Prohibitive

Petitioners seek to avoid the arbitration agreements they executed by reference to the purported high costs of arbitration. Petitioners fail, however, to provide any evidence to support this contention. Petitioners' argument ignores the following facts regarding costs: (1) the arbitration agreement incorporates the AAA rules allowing the arbitrator to defer, reduce, or potentially eliminate the administrative fees in the event of extreme hardship on the part of any party; (2) the arbitration agreement expressly provides that the lender will pay all arbitration fees and expenses for up to one day of the proceedings, excluding the initial $125 fee; and, (3) the arbitration expressly provides that any other costs shall be paid by the non-prevailing party. *See Orr*, 294 F.3d at 712.

Issues regarding arbitration costs have been considered and settled by courts across the country. The Fifth Circuit applied these laws in its analysis of arbitration costs and concluded that Petitioners failed to show any likelihood that they would incur costs that would prohibit Petitioners from arbitrating their claims. *Orr*, 294 F.3d at 711-712 (citing *Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79 (2000)). The Fifth Circuit held that "the mere fact that [Petitioners] face the possibility of being charged arbitration fees, including paying the arbitrator's fee if directed to do so by the arbitrator, does not render the Agreements unenforceable." *Id.* Petitioners present no new evidence to warrant overruling this decision.

Regardless of the caricature painted by Petitioners in their Petition, the facts demonstrate that the arbitration agreement at issue adopts the fair and accepted fee schedule set forth by the American Arbitration Association. Furthermore, both the AAA rules and the plain language of the arbitration agreement provide for a just allocation of arbitration costs. First, under Rule 51 of the Commercial Dispute Resolution Procedures, "[t]he [American Arbitration Association] may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees." *See Orr*, 294 F.3d at 712. Second, the arbitration agreement expressly provides:

> The party requesting arbitration shall at that time pay the arbitrator $125.00. Lender shall pay arbitrator all other arbitration fees and expenses costs up to one day (8 hours) of proceedings. Any other such costs shall be paid by the non-prevailing party.

See Orr, 294 F.3d at 712. Under these provisions, Petitioners incur no costs unless the proceedings extend past one day and the Petitioners lose. In any event, Petitioners could petition the AAA to defer or reduce the fees. Importantly, Petitioners present no foundation for the calculation of arbitration fees and costs used in their Petition. (Pet. at 14). Accordingly, any argument that arbitration is too costly is simply unconvincing and unsupported by any evidence.

Petitioners' citation to *Shankle v. B. G. Maint. Mgmt., Inc.*, 163 F.3d 1230 (10th Cir. 1999) and *Cole v. Burns Int'l. Sec. Serv.*, 105 F.3d 1465 (D.C. Cir. 1997) does nothing to save their unsupported allegation that arbitration is too costly. (Pet. at 14). No one disputes the mere fact that many "courts have held arbitration agreements unenforceable because the costs were too high." *Id.* In these cases, however, the parties met their burden of demonstrating that the cost of arbitration would effectively eliminate their right to adjudication of their claims.

In *Cole*, the court noted that Cole's employment was conditioned on acceptance of an arbitration agreement requiring arbitration. *Cole*, 105 F.3d at 1483-1484. Cole demonstrated that there was no indication that arbitration fees could be reduced or waived for financial hardship and that the agreement did not state who would pay the fee. *Id.* Accordingly, the Court held that the cost of arbitration would likely be prohibitively expensive for an employee like Cole. *Id.* Likewise, in *Shankle,* Shankle presented adequate proof to demonstrate that the agreement effectively required him to agree to arbitrate as a term of continued employment, yet failed to provide a forum for disputes because he could not afford the

arbitration fees. *Shankle v. B. G. Maintenance Management, Inc.*, 163 F.3d at 1235.

In contrast, whereas American Heritage and Fidelity demonstrated several reasons why the costs of arbitration are not prohibitive, including the fact that arbitration costs can be reduced, deferred, or potentially eliminated, Petitioners present no evidence to the contrary. Petitioners instead rely on possible "likelihoods" and assertions that they "may eventually have to pay a portion of arbitrator's fees." (Pet. at 14); *Orr*, 294 F.3d at 712. "Without more, the mere possibility that a party may have to share in the payment of the arbitrator's fees is not a sufficient reason to invalidate an arbitration agreement." *Orr*, 294 F.3d at 712, (citing *Williams v. Cigna Fin. Advisors*, 197 F.3d 752, 764-765 (5th Cir. 1999), *cert. denied*, 529 U.S. 1099 (2000)). Consequently, Petitioners' bare allegations relating to arbitration costs fail to show any likelihood that they will be effectively precluded from arbitrating their claims. Therefore, Petitioners fail to meet their burden of proof as set forth by this Court in *Green Tree Fin. Corp. - Ala. v. Randolph* and the agreements are enforceable.

III. The Fifth Circuit Opinion Is Not A Contradiction

Petitioners' allegation that the Fifth Circuit's opinion is a contradiction stems from their gross misstatement of the questions presented. The Fifth Circuit did not hold that "the Commissioner does not have the power to prevent arbitration agreements in their insurance products." (Pet. at *i*). The arbitration agreements at issue are contained in various loan agreements, not insurance policies. Therefore, even a simple review of the Fifth Circuit's

Opinion demonstrates no contradiction exists. In its opinion, the Fifth Circuit stated:

> because no Mississippi statute addresses, much less prohibits or restricts, arbitration of credit insurance-related claims, disputes or controversies, the Commissioner of Insurance for the State of Mississippi (the "Commissioner") is without regulatory authority to prohibit arbitration clauses relating to insurance.

Orr, 294 F.3d at 708-709. In other words, the mere fact that the Commissioner may permit or disallow arbitration clauses in insurance policies does not grant him the power to prohibit arbitration of all insurance matters.

Furthermore, the fact that the Commissioner had not approved arbitration clauses in insurance policies when this action commenced does not support Petitioners' theory that the use of mandatory, binding arbitration agreements contained in third-party contracts is unlawful in Mississippi. Even if this fact did support Petitioners' theory, during litigation of this action, the Commissioner approved an arbitration agreement contained in an insurance policy.[4] This approval demonstrated that Mississippi

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[4] Petitioners erroneously allege that the press release announcing the Commissioner's allowance of arbitration agreements in a Primerica Life Insurance contract was not in the record. (Pet. at 10-11). The error of Petitioners' allegations is evidenced by the Fifth Circuit's Opinion, which specifically states, "*As the record indicates*, Appellants' contention that the Commissioner never permits insurance disputes to be subject to arbitration is incorrect. *The record indicates* that the Commissioner can permit or disallow insurance disputes to be subject to arbitration as the Commissioner deems fit." *Orr*, 294 F.3d at 709 (emphasis added).

law does not prohibit arbitration of insurance matters, otherwise the Commissioner's approval itself was unlawful. Further, this approval demonstrated the fallacy of relying on an unsupported affidavit by the Commissioner, which is predicated upon a Mississippi Attorney General opinion that explicitly states that the FAA was not referenced. Accordingly, the contradiction present in this dispute is located in Petitioners' argument, rather than the Fifth Circuit's opinion.

IV. The Fifth Circuit Opinion Does Not Conflict With Other Circuits

In a hollow attempt to satisfy the standard needed to obtain a writ, Petitioners try to construct a conflict of opinions between the circuits. Petitioners point to three cases in arguing that the Fifth Circuit decision conflicts with decisions in other circuits. (Pet. at 10-11). While there have been countless decisions in other circuits that deal with arguable conflicts between federal law and state insurance law, the simple fact that other decisions deal with state insurance schemes proves nothing. In each of the cases cited by Petitioners, the parties and the courts point to specific provisions of a state regulatory scheme that would be invalidated if the McCarran-Ferguson Act were not applied. In contrast, in this action, Petitioners "fail to identify any statute that would be impaired, invalidated, or superseded by the application of the FAA." *Orr*, 294 F.3d at 708.

For example, in *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1307-1308 (8th Cir. 1997), the Eighth Circuit concluded that the McCarran-Ferguson Act barred application of RICO laws because the unique nature of

RICO laws, although parallel to specific Minnesota laws, differed in availability and the magnitude of remedies provided and could impair Minnesota's regulatory scheme. In *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 705 (10th Cir. 1988), *cert. denied,* 489 U.S. 1096 (1989), the Tenth Circuit ruled that the district court should have abstained from hearing the action because Oklahoma insurance law explicitly provides for a particular state court to oversee liquidation of insolvent insurers under the Uniform Insurers Liquidation Act. In *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564 (E.D. Pa. 1974), the Pennsylvania district court held that the McCarran-Ferguson act exempted plaintiffs' rate fixing allegations from the Sherman Act. The court noted numerous statutory and regulatory provisions discussing and setting forth Pennsylvania insurance rate law. *Id.*

A key distinction in each of the above-cited cases is the ability to point to specific state laws that would have been invalidated had the courts not applied the McCarran-Ferguson Act. Unlike these cases, the Petitioners have not and cannot identify a single Mississippi law that will be invalidated by applying the FAA. Therefore, the Fifth Circuit's opinion is directly in line with that of other circuits holding that the McCarran-Ferguson Act is only applicable when a state insurance law would be invalidated, impaired, or superceded. Consequently, no conflict between the Fifth Circuit's opinion and other circuits exists.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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